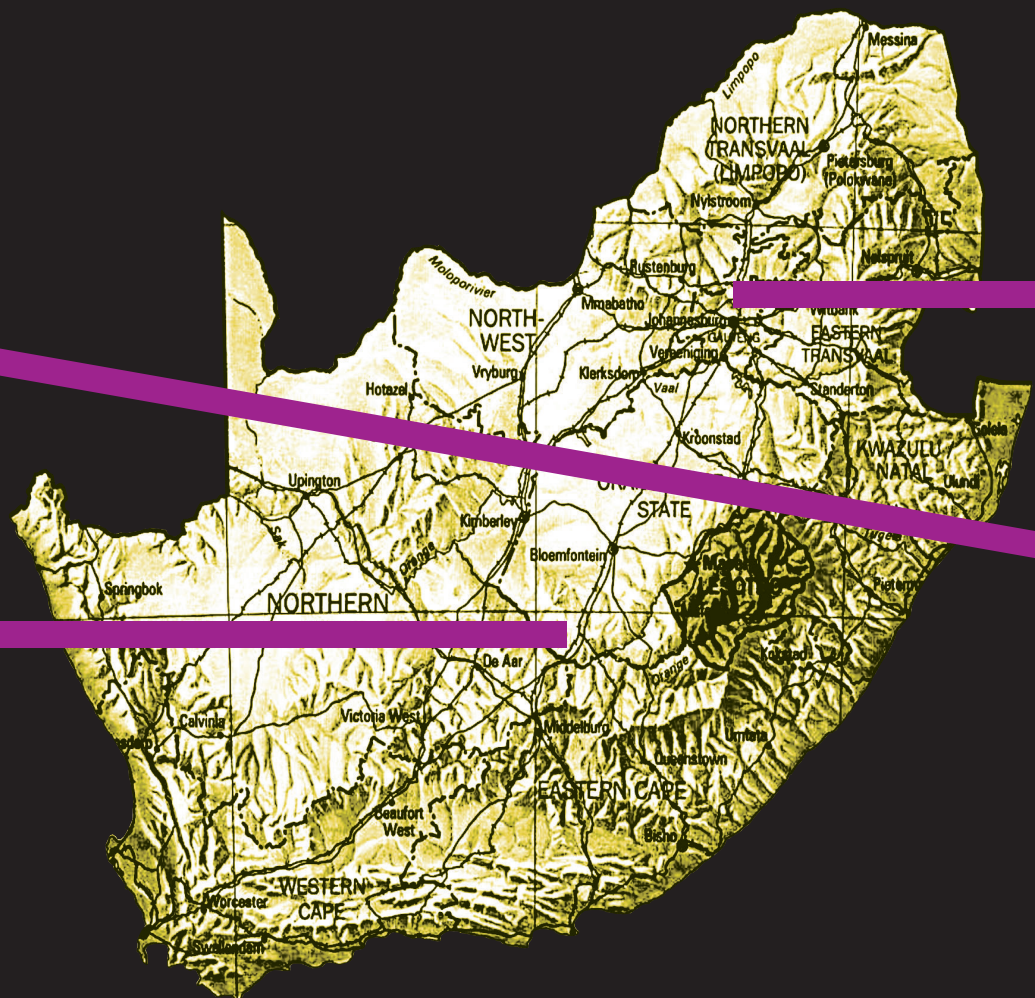




Dispossession and Access to Land in South Africa:

An African Perspective

Michael A. Yanou

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Preface

A new book on land law in the new constitutional dispensation in South Africa from an African perspective is to be welcomed. The book consists of 8 chapters and is 140 pages in length.

Dr Yanou has based his book on material submitted for his doctoral thesis at Rhodes University in 2005 entitled *Access to Land as a Human Right: The Payment of Just and Equitable Compensation for Dispossessed land in South Africa*.

Yanou traces the notion of dispossession from the Frontier Wars of the 19th Century in the Eastern Cape in which the Chiefs who participated lost not only their chieftainships but also large tracts of ancestral land. This was followed by dispossession that occurred during the apartheid era of land removals, particularly as a result of the notorious Land Act of 1913. He also discusses various land tenure reform legislation.

Yanou argues that, in a country like South Africa that lost most of its ancestral land during colonialism and apartheid, access to land for the dispossessed should not be equated with the protection of property acquired under apartheid. He also touches on the controversial issue of aboriginal title in the light of case law. On this topic the reader should also see the following: G Pienaar “*Aboriginal Title of Indigenous Ownership: What is in a Name? (2)*” 2006 THRHR; T.W Bennett & C.H. Powell “*Restoring Land: The Claims of Aboriginal Title, Customary Law and the Right to Culture*” 2005 Stellenbosch Law Review 431.

Yanou covers in detail the controversial question of compensation. I believe that no “last word” has yet been written on the issue. See also A.J. van der Walt “*Reconciling the State’s Duties to Promote Land Reform and to Pay ‘Just and Equitable’ Compensation for Expropriation*” (2006) 123 SALJ 23.

The book reviews diverse issues related to the phenomena of dispossession such as the notion of land invasions, which have been a subject of protracted litigation in post-apartheid South Africa, women’s access to land and the *Bhe* Case.

This well-written book covers case law up to 2005 and should be commended for being so thoroughly researched.

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Introduction

Land is a vital resource whose ownership and control have been the most contentious issue in South Africa since the arrival of the white man in the country. The early history of the country can, with some justification, be summed up as a gigantic struggle for land between the indigenous African peoples and white settlers.¹ Indeed, (Budlender and Lasky 1990: 150) have observed that the struggle for access to land has always been a perennial problem in this country.

This book explores the struggle over land between South Africans of African descent and those of European extractions in which the latter dispossessed the African of substantial portions of their ancestral land. Although the study is technically limited to dispossession that occurred on or after 19 June 1913, the book undertakes an overview of the colonialist's quest for land in the country and the different methods adopted to accomplish this objective. The general discourse on European colonisation of the Cape by conquest is situated within the context of an attempt to get control over the natural resources of the region. This colonisation of land gives perspective to the subsequent dispossession of Africans during apartheid which is the single most critical tragedy of South Africa.

The book analyses themes such as dispossession, the conceptualisation of access to land as a human right and access for the previously disadvantaged which are principal ideas underpinning the study. The post-apartheid conceptualisation of access to land as a human right is clearly a logical consequence of the massive dispossession of the ancestral land of Africans since the latter also raised significant human rights considerations.

The property clauses of both the Interim Constitution² enacted on the 6th of April 1994 and the final 1996 Constitution³ were, in the context of South Africa, revolutionary as they altered the entire normative landscape of property in the country. This author's thesis is that the new property dispensation is geared towards two principal directions. Firstly, it constitutionalises the right of the dispossessed to access land and secondly that it predicates the basis for post-apartheid access to land on the need to ensure equitable redistribution of the country's land between blacks and non-blacks.

The book examines the property structures created by s 25 of the 1996 Constitution on the premise that the wholesale dispossession of

Africans from their land dictates certain sensibilities in the construction of the property clause. This, in particular, requires that the tension between private property and public interest inherent in the above provision should be resolved such that will enhance the capacity of the dispossessed to access land. This requires a movement away from the perceived wisdom in the western world which according to (Ngugi 2004: 1) proceeds from the view that private property is key to efficient market performance and economic development. Though not a fully-fledged comparative study, the book, nevertheless, draws illuminating examples from appropriate foreign jurisdictions which have offered insights into the interpretation of the relevant property provisions of South Africa.

The author makes his concluding remarks in chapter 8. This chapter which is a summary of the study, contains the author's opinion on the central question of how the constitutionalisation of property has impacted on the dispossessed capacity to access land. Proceeding from the premise that decades of dispossession in South Africa inevitably led to an unsustainable lopsided distribution of land between whites, black and others, and the impoverishment of the blacks, the author calls for a revision of the constitutional Property Clause. The call is justified on the grounds that the country's history has left the country with one of the most acute problems of landlessness in the world whose effect is being felt to this moment.

Theoretical framework of the study

This study raises the interesting link between access to land and human rights since the right to land in s 25 of the 1996 Constitution is amongst the bills of rights. Although Coke, Voltaire and Rousseau all speculated on natural rights from which human rights derived, the present discussion is however limited to a review of the analysis of John Locke. Both the idea of human rights and the right to property can rightly be said to take their form from Locke's conception of the equality of man. (Locke 1948:4-6) believed that it was possible to identify the basic rights of man by imagining man in a depoliticised state of nature. Noting, however, that this state of nature was imperfect, Locke stated that the individuals in it concluded two social compacts to enable them regulate the inevitable conflict of interest of the individuals in it.

In the first of these compacts, individuals joined together in a civil society while in the second they established a government and gave it political power to protect their rights. (Locke 1948: 15) situates the acquisition and protection of property within the context of this right as follows:

“Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person; this nobody has a right to but himself.... Whatever, then, he removes out of the state that nature has provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property”

From Locke's above theoretical standpoint, man's right to property (land inclusive) is fundamental and based on the fact that God had given the earth as a common heritage to the children of men. He noted also that God gave the children of men “reason to make use of it to the best advantage of life.”

The Lockean theory of property is broad because it defines property in the context of life, liberty and estate. This study which relates to dispossession and access in South Africa is limited to the notion of property in land, an idea that has swung between three (sometimes conflicting) theoretical foundations. These theoretical perspectives according to (Gray & Gray 1998: 18) relate to the concept of understanding property either in terms of empirical facts, artificially defined rights or duty-laden allocation of social utility. This view of understanding property in land is widespread in common law countries and has implications for the new South African property regime as well.

In summary, the empirical fact perspective de-emphasises abstract theories in its attempt to explain the notion of property in land. It stresses the raw data on the ground primarily with a view of empirically establishing the relationship between land and the individual or community. On this view, the ascertainment of property in land according to the same authors has more to do with the behavioural data such as possession than with words and documents. These data are symptomatic of a deeply instinctive sense of belonging and control.

Gray & Gray (1998:26) contend that the recognition of aboriginal title in Australia was the direct consequence of the validity of the empirical fact theory in determining the status of land. They argue that after tens of thousands of years of occupancy of the land by the natives it is impossible to declare them intruders in their own land or say that the Crown's acquisition of sovereignty extinguished native interests. Although aboriginal title is not recognised in South Africa, it is safe to also conclude that post apartheid land reforms are based on the fact that Crown's acquisition of sovereignty and subsequent grant of land to European settlers did not extinguish the interest of indigenous Africans in their land. By rejecting the alternative argument in Kenya for proceeding on the immoral assumption that conquest and colonisation amounts to the

conquering Europeans acquiring radical title to the land (Ngugi 2004: 5) agrees with the above conclusion.

The theory of property as right concentrates on describing land by reference to a bundle of abstract rights. Although this theory is peculiarly English, it does have significant resonance in South Africa because the current property paradigm recognises different property rights and interests. Thus s 25 of the 1996 Constitution recognises ownership, customary tenure⁴ and labour tenancy.

The third theoretical perspective on which the understanding of land is based relates to the identification of the various uses to which land is put. These elements of utility are then labelled as property. Land does generate multiple utilities such as for occupancy, investment or aesthetic appreciation. In Nigeria, for example, the broadest right over land is that of occupancy, which a certificate of occupancy under the Land Use Act 1980 protects. Countries that pursue a utility-based approach, invariably, vest the radical title of land on the state, which holds it in trust for the people. The land reform elements of the post apartheid South Africa exhibit striking resemblance of the utility theory. The theory has close affinity with distributive justice because it stresses the government's watchdog role in land administration.

This study is further situated within a social purpose context of land which according to (Singer 1996: 83) relates to the idea that land has an inescapably distributive feature. The conceptualisation of access to land within this context suitably applies in South Africa because of the history of land dispossession in the country. Although the objective of the social purpose approach is similar to that of the social function approach, there are clear differences between them. (Robertson 1996: 319) credits Duguit, a French philosopher, with playing an influential role in formulating the social approach to land.

Duguit expressed a strong dislike of the Roman property concept of dominion because of the latter's stress on an owner's absolute right to property. He was critical of the fact that this right included that of use-benefit-disposal and also the right not to use the property. Duguit argues that because an individual was a part of society, it was wrong for property to be reserved for his exclusive use, noting that, a better view is for property to serve society, i.e. have a social function. He considered anything less as a violation of the modern conscience.

The South African vision of land may be deduced from a statement made by the Minister of Land Affairs in January 1997. According to the Minister, 'ownership of land carries with it both rights and duties.' Owners of land must exercise their rights in a way, which respects the human dignity and basic human rights of those who live on the land.

Although this view of land is compatible with the Latin American approach (which in the main was a response to a similar historical experience of the dispossession of the land of the indigenous populations), the new constitutional regime that enjoins the state to facilitate citizens' access to land on an equitable basis is a welfarist response to dispossession.⁵

Social welfare component of land

The social welfare theory stresses the adoption of land use options that will lead to a redistribution of land to attain social welfare objectives such as the fight against poverty and the provision of greater security of insecure tenures (Allen 2000: 202). The social welfare component of land has been studied mostly by sociologists and anthropologists and is concerned with the impact of land use on the individual, family and community. The South African land policy is essentially welfarist in content as it is a response to the needs of the majority of black citizens.

(Zyl 1996: 238) observes that distortions in the land regimes of the past caused massive poverty in the rural areas (the homelands were hardest hit), insecurity of tenure for blacks and unrestricted access to land by a privileged white class. From the Freedom Charter through the RDP to the current post-independence legal dispensation, there is a discernible indication to redress the wrongs of the past. This wrong was identified by the (Freedom Charter 1990) as the robbery of the people's birthright to land, a robbery, which in the Charter's opinion, should be resolved by a welfarist approach requiring that 'all other industries...be controlled to assist the well-being of the people.'

A key element of this approach is the fact that land is no longer to be viewed as a factor of production that has to be accumulated because of its monetary value. The welfare approach regards the possession of land as a crucial ingredient for the dignity of man. Section 25(6) of the 1996 Constitution which enjoins the state to remedy insecurity of tenure, is typically welfarist in content. This welfarist component is sensitive to communal aspirations and interests and ties with s 25(6) by recognising that the possession of land is crucial for the dignity of the community.

Social purpose-economic

It is obvious that post independent South African economic policy is aimed at creating a new society in which wealth and land will not be concentrated in the hands of a few. This approach as (Zyl 1996:238) further notes requires a review of the dominant form of land management and agricultural production, which was based on the white owned large-scale farm accounting for 86 percent of the country's land. The Green

Paper published by the Department of Land Affairs has indicated a new policy direction based on small-scale production models.⁶

This new philosophy requires that fertile land be divided into small parcels and granted to families to farm. This candidate applauds this policy because it has the potential to bring economic benefits to more people, increase employment and free up the welfare budget for other productive use.⁷

Social purpose-political

One of the major consequences of apartheid was the rise in political consciousness amongst black Africans who were its major victims. Land dispossession played a prominent role in engendering a strong resistance to the apartheid superstructure in South Africa. Resentment to land dispossessions was tapped by the ANC and used as an effective weapon for political mobilisation.⁸ The ANC also made access to land by the rural masses a prominent political plank. In doing so, the ANC was acting in terms of (Ngugi 2004: 2)'s view that "when it comes to property rights, the relevant questions are who to protect and how, and not whether the government should regulate or not."

That land was a crucial political issue is reflected by the land invasions that occurred both during pre and post-independent South Africa. (The RDP 1994: 2:4.1) recognised that land is a resource to meet the basic political needs of the people and set the tone for a fundamental land reform programme by stating that "no political democracy can survive and flourish if the majority of its people remain in poverty without land."⁹ Events in Zimbabwe also show the strategic importance land plays in the politics of a country. Gubby,¹⁰ the country's chief Judge acknowledged that the disruptive land invasions by war veterans from 1999 was a political question which had to be dealt with by the enactment of responsible legislation addressing the redistribution of land.

The political element of social purpose approach is particularly significant in South Africa. This is so although (Robertson 1996: 323) thinks that the political dimension is perceived as rhetorical. The idea of making the present land reform regime to adjust land rights between black and white and the gender sensitivity of the post independence land policies are all-important politically motivated developments.

The history of South Africa made a social purpose approach concept of land inevitable. The country's post independence reconstruction would hardly be respectable or amount to much if it is not driven by the need for land to respond to the above identified objectives. This is so as the country witnessed a profound manipulation of land and ideological interpretation of rules controlling access to it to achieve the political

objective of taking native land. Indeed South Africa may only succeed in avoiding the dangerous land related violence found in Zimbabwe if she adopts an access approach in balancing the conflicting interests between private property and land redistribution for the dispossessed.

African world view on property rights

A theoretical discourse on land in South Africa would be incomplete if there is no reference to the African continent's world-view as well. (Fissy 1992:1) notes that African societies did develop an ethical system under which ownership, control and management of land are defined.¹¹ However, because decisions in ancient African communities were arrived at by consensus and the community was not driven by a desire for profit or wealth, collective resources were distributed in accordance with individual needs.¹² This political mechanism for distributing benefits translated into each individual member of society having rights to goods and services on the basis of need (Bennet 1991: 30).¹³ This African perspective seeks to give content to the overriding idea of human dignity, as it guarantees the provision of the needs for dignified living.

African conception of life and the relationship between the living and the ancestors strengthened respect for the dignity of man particularly his rights to access land. The broad notion of the relationship between ancestral spirits and the behavioural patterns of the living was vividly captured by the same author thus:¹⁴

"African societies had generated an ethical system that served the goal of human dignity as effectively as any western code...the notion of due process permeated indigenous law; deprivation of personal liberty was rare; security of the person was assured.... The African conception of human rights was an essential aspect of African humanism sustained by religious doctrine and the principles of accountability to the ancestral spirits."

The colonialist misunderstood ancient African legal notions which misunderstanding resulted in the failure to appreciate the basic rights developed under indigenous systems prevailing in pre-colonial Africa. It is obvious that belief in the powers of ancestral spirits and their intervention in the day-to-day affairs of the living are prevalent in almost all African traditional societies.¹⁵ It shapes the African conception of his relationship to the community and forms part of his positive morality which influences the way law operates in African societies in the same way as most European legal rules are connected to Judaeo-Christian origins.¹⁶

African customary conception of rights has strong communal and humanistic elements, which has been expressed in different ways in the continent. In South Africa, (Mqoke 1978:11) identifies the customary

concept of *ubuntu* as constituting a variant of this philosophical framework. Relying on the Constitutional Court's decision in *S v Makwanyane*,¹⁷ he asserts that *ubuntu* translates to humanness and morality. Seen from this perspective the concept constitutes a key foundation for human rights including the right to access land. Proceeding from the premise that it emphasises respect for human dignity, it is clear that it dictates a construction of property provisions that facilitate the restoration of dispossessed land with the only minor difference of stressing conciliation rather than confrontation.

Introduction

Dispossession is a key feature of South African history, which in the opinion of (Lahiff 2004: 1) continues to shape the discourse on land holding and use. The country's legacy of dispossession resulted from centuries of the forced removal of blacks from the land through external colonialism which took different forms and racially discriminatory laws and practices. A dominant feature of South Africa's history is a recognition that land was taken from indigenous Africans in circumstances which left scars that continue to haunt the country till date.

Although divergent views have been expressed on the early settlement of the country, it cannot be disputed that Africans' occupation of the region dates back to the Stone Age era. These early indigenous settlers had a perfectly developed sense of ownership and resented intrusion into their land. The natives of South Africa, like their counterparts on the rest of the African continent, developed a pattern of land tenure that has been correctly conceptualised in human rights terms¹⁸.

This chapter raises the crucial issue of the dispossession of Africans of their ancestral land. After a historical review of dispossession resulting from European settlement in the country, the book proceeds to deal with land dispossession through the use of discriminatory legislations and policies. This discourse on the complex question of dispossession from land is necessary to evaluate the present remedies to correct the phenomena. It is however recognised, as was noted in *Alexkor Ltd & Anor v The Richterveld Community & Others*¹⁹, that it is not easy to deal with the problem because it occurred centuries ago, when the legal norms and principles of the later occupiers differed substantially from those of today.

Dutch settlement

The country's serious connections with Europe started when the Cape was first used as an outstation for European travellers heading to the Indies. The outstation was traced by (Oliver and Cape 1974: 163) to when the Dutch East India Company founded a refreshment centre in the Cape in 1652. Although these authors suggest that the Company did not intend initially to develop a settlement in the Cape and so did not covet the lands of the local inhabitants, yet their squatting on land, which was not theirs, marked the beginning of the conscious dispossession of land in what later became known as South Africa. It was no surprise when the

Company, driven by economic interests which (Davenport 1978: 18) associated with the need to provide cheap food and livestock for its passing vessels and staff, set up a permanent settlement in the Cape.²⁰

This settlement which was in fact the first act of squatting in the region proceeded from the company's assumption that the territory was terra nullius in spite of the fact that indigenous black people had occupied the land from time immemorial. This idea, (Dorsett 1998: 281) argues, was influenced by European thinkers like Emer De Vattel, a French jurist who had asserted the European's legitimate entitlement to take land which savage tribes had no need for. Similar injunctions to the colonist to take land and put it to valuable use in America are contained in Locke's second treatise. These views, which were very influential, provided for the broad British land policy in the colonies.²¹

Dispossession by fraud

Moleah (1993: 48) firmly traces land dispossession to the Company, which was in virtual control of affairs in the Cape from 1652 when Jan Van Riebeck arrived there to establish a refreshment station for ships travelling to and from the East. Once settled in 1657, the Company started acquiring land through a process described by (Robertson 1998: 14) as land deals. These transactions involved tricking indigenous peoples to sign off their land in agreements that the natives thought were only granting temporary permission for settlements.

The land acquired by the Company in this way, including the one the Company simply assumed ownership of, was subsequently granted to free burgers from 1657 onwards. The land was as indicated by (Davenport and Hunt 1974: 54) laid out in farms and granted on generous terms suggesting perpetuity thus:

Harmen Remajene's was to receive in freehold as much land as they can bring under the plough in three years. This was to remain their property forever, with the right to sell, lease or alienate, and with a three years respite from taxation thrown in...

This liberal grant of land can only be attributed to the fact that the company was giving out what it did not own. The loss was that of the indigenous inhabitants, which meant nothing to the Company. The grants introduced the feudal land holding system prevalent in Europe. The difference in the incidents between what the Company established in the Cape and what obtained in Europe was minor. In Europe, the obligation was to provide service while in the Cape it was to sell produce to the Company, which it undertook to buy at a fair price.

Suffice to say that these grants were tainted with illegality because the process which became the main tool through which blacks were dispossessed of their land was based on a fraudulent assumption by the Company that it had overlordship over an undefined area of land at the coast. From the Company's point of view, this overlordship over land was an unlimited one that extended into the hinterland (Miller and Pope 2000: 5).

This notion, which in essence results from a casual assertion of title to land because of dominating control based on might or tricks, has been a cardinal feature of European settlers in Africa generally and the South African social construct (apartheid) which lasted until recently in particular. The idea that radical title should vest in this way or private property with such origin should be entitled to strong protection has been criticised in a Kenyan study by (Ngugi 2004: 5) as problematic because of its moral opprobrium.

Dispossession by squatting

After acquiring control over the land as indicated above, the Company then devised a scheme in terms of which it offered land to whites.²² Although under this scheme, the Dutch were offered land by the company to use for grazing of cattle on condition that they paid token rents to the Company, some European arrivals had other ideas. Some settlers did not bother acquiring land from the Company, but rather opted on their own to roam the countryside and squatted wherever it suited them to do so.

Some free burgers in the process squatted in the vicinity of *Khoikhoi* indigenous people. The ease with which these squatter settlements were established meant that within a short time the settlers had acquired by squatting, many thousands of square miles of African land. Land acquisition had become almost free for all so much so that the rules of acquisition sometimes assumed ludicrous dimensions. There was at one point (Batavian era) a system of delineating farms by settlers, which as (Davenport and Hunt 1974:55) noted, involved the practice of leisurely riding on horse back in all directions from a defined spot for half an hour. It is in this way that the Afrikaner people who (though primarily Dutch) were an amalgam of peoples from all over Europe came to establish themselves as the new owners of the land in the Cape.²³

Modern day squatting and invasions of private property by dispossessed poor black Africans which has received exaggerated publicity in Zimbabwe and South Africa by the western media and human rights campaigners has always to be interpreted in the context of the first invasions by people of European extraction. To do otherwise is a

deliberate political choice calculated to sanctify colonial expropriation in the country.

British settlement

Introduction

British occupation of the Cape in the view of (Harlow 1963:170-173) started, in earnest, in the eighteenth century when the Dutch East Indian Company was in decline. The region was regarded by the British as of strategic commercial and military importance for the building of the British Indian Empire. Apart from being a fortress for the defence of the entrance to the Indian Ocean, the region as well provided an excellent opportunity for commerce. Britain's occupation of the Cape was according to (Harlow 1963: 171) also motivated by the desire to forestall French designs in the region.²⁴

The author notes that the British settlement in the Cape was directly influenced by H. Dundas who was Foreign Secretary from 1784-1805. Dundas was quoted by (Harlow 1963: 170) as urging the Dutch Company in 1791 to 'place all its settlements within the benefit of British power and protection' in return for a guaranteed monopoly of the spice trade and the trade with China. Although the Dutch Company declined the offer, the British landed troops in the Cape in August 1795. These troops routed the Dutch in September of the same year and took possession of land, which was neither theirs nor that of the Company.²⁵

Dispossession by proclamations

This land grab was followed by subsequent acts of dispossession of the lands of Africans resulting from the gradual extension of British dominion in the interior of present day South Africa. British policy, which revolved on the control of land, was premised on the assumption that the native, because he was uncivilised, could not be dealt with as a negotiating partner. The land notes (Opren 1964: 117) could not be the subject of any transaction between British administrators and the Africans since the territory was officially uninhabited.²⁶

Opren who was himself a land surveyor, observes that Sir George Grey, the Cape Governor, dismissed the possibility of a civilised relationship with natives. Grey was of the opinion that 'treaties' could not be a basis of dealing with indigenous peoples because 'experience had truly shown the futility of such compacts.' He stressed very clearly that 'authority instead of treaties must be' the basis of dealing with the natives.²⁷

This authority was essentially exercised through the issuing of proclamations. (Duly 1968:48)²⁸ points out that at about 1795, the vastness of the colony and the associated transportation problems delayed

the implementation of government proclamations. This factor had an adverse effect on efficient land administration and created ideal conditions for land grabs by Europeans. The quest for land by Boers in the Eastern Cape and the forceful squatting on native land became pronounced during the administration of Sir Cradock in 1811. A circuit court report was cited by (Duly 1968: 48) showing that during this period, all the young of this region had 'no other prospects than the breeding of cattle and to obtain places for that purpose.'

Since acquisition by confiscation was major factors in the extension of British rule territorially, Cradock later devised a land policy that legalised lands acquired in this way. This policy argues (Duly 1968: 45) was devised to (circumvent international law's prohibition of free hold tenancies in dependent societies) gave legal security to land acquired through this method. The author points out that Cradock believed that his land policy would 'unite crown and colony in the pursuit of common goals.'²⁹ In a letter written in 1811, Cradock described the kind of grant this policy entailed as ensuring:³⁰

that every proprietor of land should look upon it as his own estate, as a provision for himself and family and that no future event can injure him, or render it unproductive but the want of industry or his own mismanagement. This is the situation of England and how abundantly it is proved.

British administrators who used land as a tool to placate the settlers, gave it away in the words of (Opren 1964: 112)³¹ 'right and left, or sold at public sales at ridiculous prices.'³²

The grantees of these British leases as a matter of consistent practice often on their own extended their holding as much as they pleased, so long as this did not incorporate the possession of other colonists.³³ Land was also granted to colonists at the frontier regions as reward for their fighting of natives in the multiple wars over land.³⁴ These frontier colonists were to provide a buffer between lands already annexed and natives particularly the Basutos who, enraged by the dispossessions, constantly attacked outlying outposts of the British administration and white settlements.

One British governor after the other by proclamation annexed much of what is today the Eastern Cape of South Africa. Sir Harry Smith, the second governor in the Cape at about 1848 is considered to have been the administrator who exploited the use of proclamations to the maximum. On the 3rd of March 1848, he issued a proclamation declaring the sovereignty of the Queen over the region between the Orange and Vaal rivers. This area covering a huge track of land later became known simply as British Territory.³⁵

This Proclamation, which effectively meant the loss of Africans' rights to their land, was as noted by (Opren 1964: 56) curiously stated to be for 'the protection of the just and hereditary rights of the native chiefs and people.' It should be noted that the exact specification of the territories involved in this proclamations was impossible to ascertain. The identification of the outer limits of the territory with the phrase 'region between the Orange and the Vaal rivers' made it possible for the territories to be infinitely extended since the areas were neither mapped nor surveyed.

Dispossession by legislation

An early indication that the country was going to pursue a legal approach that regarded land as a political issue rooted in the ideology of race was revealed by the Lord Milner Commission's report of 1903-5. The commission was according to (Moleah 1993: 224) set up to investigate government policy on land. Although the commission rightly recognised the attachment of the natives to their land, it nevertheless, unanimously concluded that the land should be vested in European government. The latter was to subsequently carve out portions of the land for use as reserves or locations for Africans.

This report set the stage for the systematic displacement of Africans from their ancestral land through the use of obnoxious legislations during the course of over eight decades.³⁶ This study deals with access to land by the dispossessed as an issue of human rights in view of the view of (Gray 2000: 221) that the scale of the dispossession involved has raised significant human rights considerations. Three legislations viz: the Native Land Act No 27 of 1913³⁷, the Native Trust and Land Act 18 of 1936 and the Group Areas Act No 36 of 1966 were the principal instruments used to dispossess Africans from their land.

Native land act no 27 and land dispossession

This legislation was the foundational pillar of dispossession because it formed the basis for the allocation of land between the races in South Africa. It restricted the acquisition and utilisation of rights to land to membership of a specific population group. The Act legislated Africans out of their land by designating 55,913 square kilometres of the country's land, constituting 7 percent of its land surface to black exclusive use. (Mostert 2002: 401) had pointedly noted that by this legislation, whites, an alien people making up just 13 percent of the population as against 80 percent for blacks, had control and access to over 80 percent of the country's land.

Although in terms of s 8(2), the Act did not apply in the Cape, the Native Land Act has been described by (Miller and Pope 2000: 22) as monstrous for turning the native into a pariah³⁸ in his own country. The reserves apportioned to blacks which were plainly too small to cater for the land needs of the people, created untold misery arising from landlessness and poverty.

There were, however, no known legal challenges to the Act in spite of its grave impacts on Africans (Harley and Fotheringham 1999: 17).³⁹ It is not difficult to see why this was so. A close scrutiny of the philosophy of apartheid will reveal a complex relationship between the various institutions of state. (Vander Walt 2001: 62) describes the philosophy as reflecting a synergy between law and Afrikaner ethnic nationalism in which the legal code was inseparably woven into the political code of exclusivism such that both had become conceptually indistinguishable.

This judicial attitude was traced by (Bright and Dewar 1998: 10) to the doctrines of *terra nullius* actively advocated by John Locke and the common law doctrine that the crown is the source of title to all land.⁴⁰ Because the early Australian cases of *Attorney General (NSW) v Brown*⁴¹ and *Cooper v Stuart*⁴² had established the broad principle of state ownership of land, legislations dealing with restricting natives' access to land such as the Native Land Act of 1913 could hardly be successfully challenged under the colonial legal dispensation.

Although (Miller and Pope 2000: 22) have suggested that Prime Minister Smuts was even against the continuation of racial segregation designed and entrenched by the 1913 Act, this idea is misleading. The principle underlying his proposed desegregation of land legislation was correctly described by one Rev. Mtinkulu who said that in Natal, the intention was to keep the black man down.⁴³ Mtinkulu's view seems well founded because to open up land to be bought under conditions where prices were to be determined by market forces was an indirect way of putting the lands beyond the reach of Africans. The latter who had been dispossessed of their land and had been made to work under contracts with wages barely enough for survival,⁴⁴ could not possibly be competitive in an open land market.

Although it is impossible to put an accurate figure on the number of persons dispossessed by the 1913 Act, the forced removal of Africans caused by it was devastating for the South African black. The Act was so drastic in its impact that (Bundy 1990: 6) considered it the first pillar of apartheid.⁴⁵

The native trust and land act 18 of 1936

This Act which was as pointed out by (Davenport 1978: 64) renamed twice, firstly as Bantu Trust and Land Act and then as the

Development Trust and Land Act⁴⁶ was meant to appear as a palliative intended to placate Africans for taking away their voting rights in the Cape.

The 1936 Act had, as its objective, the release of areas of land for native use with a view to promoting farming efficiency. The Act released 26.616 square kilometres of additional land for black use, out of the 29.943 square kilometres recommended by the Beaumont Commission. White farmers had by their protest caused a reduction of the recommended acreage by 3327 square kilometres. It would be ordinarily thought that this 1936 Act was a welcome relief⁴⁷ because by making more land available, it addressed, to some extent, the problem of land dispossessions and landlessness (Jaichand 1997: 10). A critical appraisal of the Act, on the contrary, reveals that this was not to be the case.

Firstly, much of the land 'released' was according to the same author held and owned by Africans either directly or indirectly through existing private trust.⁴⁸ On the contrary, because very few Africans actually got more land through these Acts, both (Jaichand 1997: 10) and (Chigara 2003: 20) expressed the view that the Act only consolidated the existing land allocation in place and did not introduce any new land allocation system. This conclusion is evident from the fact that the so-called released lands were land already in black hands.

It has even been contended that the 1936 Act actually led to more dispossession of land. Relying on a parliamentary response by the Minister of Bantu Education and Development, (Miller and Pope 2000: 2) showed that the Act resulted in a pronounced fall in the acquisition of land by blacks in the period after 1936. The idea therefore, that the 1936 Act was meant to benefit the natives appears once again to be another publicity stunt.

It may be observed that chapter IV of the Act was specifically aimed at tackling the problems, which white farmers described as the concentration of black people on their farms. It certainly succeeded in achieving what it set out to do, because it provided the basis for the forced removal of blacks living on white owned farms.

Dispossession through the group areas act

The Group Areas Act No 41 of 1950 was repealed and replaced by the Group Areas Act No 36 of 1966 which has also been repealed.⁴⁹ Both laws which followed the same pattern were in fact designed to accomplish the same objective. The bill of the latter was described as embodying the essence of the apartheid policy. (Schoombe 1985: 77) insists that like the Land Acts before it, this legislation was aimed at the political control of

the ownership of immovable property and the occupation and use of land and premises on the basis of race.

The Act provided for the setting aside (that is partitioning) of areas for the exclusive use by members of the specific races in the country. Those falling outside the races were regarded as disqualified persons in relation to the ownership or occupation of land in the respective areas. The Act classified the country into three racial groups viz: whites, blacks and coloured. The coloured group was further classified into three distinct units of Indians, Chinese and Malays.⁵⁰ Although the ultimate goal of the Act was land control, there were lands in controlled areas, which attracted less rigorous control.

The Act simply completed the forced removals of persons who were left over under the preceding land legislations. Under it, a disqualified person in lawful occupation of land within an area not apportioned to his/her race lost possession of it. This happened one year after a proclamation of the status of the area and after the issuance of a ministerial three-month notice where the property is residential (Schoombe 1985: 80.) The need to ensure that the strict regime of racial separation was effective could be seen from the way corporate bodies were treated.⁵¹ A juristic body was considered as belonging to the racial group of the individuals having a controlling share in the company. The latter, like a natural person, could also not occupy property in an area outside its racial group.⁵²

Persons or corporations who held land by acquisition only fared marginally better. A disqualified person holding property under this heading could continue to do so for life after the proclamation of the Group Areas Act. Those who had testamentary interests could hold property for ten years after the proclamation. The impact of this legislation was traumatic particularly for coloured and middle class blacks. It is perhaps for these reason that (Schoombee 1985: 99) lamented that in spite of⁵³ ‘... an acute and growing housing shortage, yet whole neighbourhoods have often been flattened in the course of the Group Areas.’

The cost of the Group Areas Act was inestimable. Apart from the obvious landlessness described by Schoombee above, the economic burdens resulting from them simply worsened the plight of already disadvantaged groups like blacks.⁵⁴ The resultant relocations from the application of this Act sometimes involved the breaking up of extended families, which is a crucial social security unit of a typical African community. Interestingly, a minister for community development commended the law as one of the greatest spiritually emancipating measures in South Africa.⁵⁵

Section 19 of the Act gave powers to the president to declare by proclamation, certain parts in a group area as open for use for specified purposes. Areas in white areas have, pursuant to this section, been declared open for commercial use only. Such usage was strictly construed as always prohibiting any form of residential occupation even when such was demanded by the commercial imperatives of the business. Even here, non-whites had to obtain a permit to enter the commercial area to do business.

Although there were vigorous judicial challenges⁵⁶ of this Act, there was no prospect of success for two reasons: firstly, the operation of the Act was based on executive discretion which exercise was not subject to procedural fairness. The appellate courts blatantly took sides with the State and unreservedly committed themselves to ensuring that the policy objectives of the Act were achieved.⁵⁷ Secondly, the Act was silent with regard to the grounds upon which the relevant administrator would make a proclamation declaring an area as belonging to any racial group. Nor did it provide the considerations that should be taken into account in doing so.⁵⁸

Although the Appellate Division case of *Minister of Interior v Lockhat*⁵⁹ related to proclamations issued under the Group Areas Act, 77 of 1957, it, in my opinion, illustrates the attitude of the courts to the implementation of the Group Areas legislation generally.⁶⁰ The case involved a proclamation of a group area in Durban. Some Indian owners and occupiers of property in the area, who were affected thereby, were understandably furious with its change to a white area and challenged the proclamation on a number of grounds. It was argued on their behalf that the administrators did not consider the availability of alternative accommodation elsewhere before issuing it. It was also contended that the order resulted in substantive discrimination between whites and the dispossessed plaintiff.

The State in response cited various exceptions in the Act as providing justification for the Proclamation. The facts and arguments in this case disclose that the validity of the entire Act was indirectly in issue. The trial judge gave judgment in favour of the dispossessed plaintiffs. He, quite correctly, held that the Governor-General-in-council acted *ultra vires* when he failed to seriously consider the effect of the Act on those affected before issuing the Proclamation. The judge acceded to the plaintiffs' arguments that it was necessary for the Governor to have considered the availability of suitable alternative accommodation.

On the substantive issue of the inequality and partiality against those affected, the judge also held in favour of the Indians. He stated that there was nothing in the Act which authorised discrimination against one racial

group in favour of another as the instant Proclamation did. He, therefore, held that it could be possible to apply the Act without treating members of different races partially.

Although Henochsberg, J's decision may be raised for its forthrightness, it should be pointed out, however, that it was in certain respects wanting. His view that were the Act to authorise the state (either expressly or indirectly) to do unreasonable things, the court would have sanctioned such acts is absurd because courts cannot be expected to give effect to unreasonable acts.⁶¹ It is equally difficult to see how this Act, which was regarded as embodying the very essence of apartheid, could be applied without partiality and injustice.⁶²

The Court of Appeal reversed the trial decision, holding that the application of the Act was left to the good sense of the Governor-General and that the courts could not review his discretionary authority. This seemingly gave a blank cheque for those vested with the powers to apply the Act. The Act's unconscionable disregard for the idea of equality and the distress caused by forceful removals was reflected in Holmes, J. A's judgment where he stated:⁶³

The Group Areas Act represents a colossal social experiment and a long-term policy. It necessarily involves the movement out of Group Areas of numbers of people throughout the country. Parliament must have envisaged that compulsory population shifts of persons occupying certain areas would inevitably cause disruptions and within the foreseeable future substantial inequalities...

This decision confirms the widely held view that apartheid received some level of judicial support. It must, however, be criticised for its unsoundness in terms of principle. Its reliance on legal technicalities under the guise that it was called upon to construe a purely legal question is unhelpful. While courts, the world over, prefer substantial justice to technicalities, the court here ignored substantial justice in favour of mere technicality.

This decision indicates rather graphically that apartheid laws were capable of the most expansive judicial interpretations in order to attain the objectives of racial segregation. Schoombee's⁶⁴ criticism of the decision is worth noting. It is, for instance, quite true that there is nothing in the Act to oust the presumption against discrimination. Equally true is the author's comments that the Act was at the bill stage described as based on justice to enhance its prospect for success. Schoombee's criticism is regarded by (Harley 1999: 36) as somewhat naïve because he failed to see the consistent use of legislations as a tool to achieve political ends.

The use of legislation and administrative practices as tools for the forced removal of Africans from land took different forms. However,

when reviewed in retrospect, the practice was conceptually based on the philosophy under which the white minority assumed the powers to systematically displace indigenous peoples from land, which the latter had possessed from time immemorial.

Dispossession through the land registration act

It seems obvious that after setting the rules for the dispossession of the lands of Africans, apartheid law had to develop a registration mechanism adapted to barring Africans from acquiring interest in dispossessed land. For (Miller and Pope No 2: 26) the rule that Africans were not competent to acquire land which was a principal feature of the Deed Registry Act 47 of 1937 became one of the most effective methods of consolidating dispossession as it thwarted attempts to acquire land by Africans.

The practice of using registration to thwart access to land in South Africa has a long history. For example, under the Glen Grey Act of 1894,⁶⁵ dealing with allotment and transfer of lands amongst the natives of the Glen Grey area, certain restrictions were specified in respect of the alienation of land. The provisions of s 5 were particularly instructive. The section made the transfer of land subject to the governor's approval and the conditions prescribed in schedule A. of item xil that made the land subject to be forfeited for rebellion. The schedule stressed the aim of this regulation by noting that the Governor's consent was relevant in checking the suitability of new purchasers to acquire land under the Act.

It does not need much imagination to see that by making rebellion a basis for forfeiture, the Act had the weakening of African resistance to the dispossession of land in mind. This is plain since they were naturally resentful of the settlers because of the latter's expropriation of their land. Such bitterness could and did explode into rebellions and wars during this period. The 1800s was a period dominated by many wars over land between the Dutch trekker and the indigenous peoples such as the *Xhosa* and *Zulu*.⁶⁶ In the view of (Letsoalo 1987: 30):⁶⁷

Whatever minor causes they may have been for the many Bantu European wars, the desire for land was the fundamental cause. Sometimes it was land for pasture and cultivation, sometimes, it was land for minerals, but always it was land

The issue of the beneficial use of land by a registered holder as a ground for forfeiture of land had a ring of dispossession about it. It had always been the view of settlers (a view inspired by European thinkers like John Locke) that indigenous peoples were not putting land to valuable use. This kind of thinking remained one of the principal driving forces of all land dispossessions in the colonies.

As an instrument to ensure that African registered holders of land could be dispossessed of their land, this criterion's potential for effectiveness was immense.⁶⁸ The Act did not have any clear definition of 'beneficial use', thus leaving its administrators with extremely wide discretionary powers. The administrators who were exclusively white and committed to the pursuit of settler interests were not inclined to an objective application of the Act.⁶⁹

Apartheid legislations dealing with the criminalisation of conduct were peculiar and did not follow common trends in the English speaking countries where penal laws were directed at curbing wrongful acts because of their high degree of moral turpitude. Most land-related offences in South Africa were created to address land related political issues. Violations of pass regulations and the so-called illegal occupation of land by blacks were offences of this kind. Convictions for them were naturally a basis for the forfeiture of land by a registered black holder. The idea was to use the registration process as a leverage to ensure that blacks did not threaten the grand apartheid design to remove them from areas reserved for white exclusive ownership.

The present argument that the registration system was structured to facilitate apartheid's grand design of controlling African land use is strengthened by two factors in the registration process. (Miller and Pope 2000 No2: 168) identified these factors when they commented that racial control over land ownership was established through the deeds registries, which used the competence to acquire rule to exclude disqualified persons. The competence to acquire rule was a direct and straightforward means of effecting control whether, the control was altruistic or otherwise. It is, however, obvious from the history of apartheid that such a control could not be to the advantage of the African potential transferee. The use of Proclamations to regulate the process had significantly increased the government's capacity to use legislation to control land use for the benefit of white interest.

In 1969, regulation 42 repealed both the Glen Grey Act and the Proclamation extending it to the other regions.⁷⁰ The regulation gave the Registrar of Deeds very wide powers to deny registration for, amongst other reasons, any valid objection.⁷¹ This Proclamation did not contain a provision similar to s 6 of the 1937 Act. Section 6 of this Act provided that a court could only annul a registered right when exceptional circumstance exists for doing so.⁷² Once again, it has to be observed that the power to deny registration for any valid reason could be used where necessary to achieve the broad apartheid land designs. Moreover, by removing the court's powers to determine the validity of the annulment of

a registered land right and placing it in the minister, the Proclamation intended to remove any possible obstacles to government's land control.

Regulation 14(3) provided for the grant and registration of quitrent tenure, which was essentially a sort of individual tenure subject to certain conditions. These conditions were similar to those contained in the repealed Act. Both the Act and the regulations had been commended for protecting the security of tenure of African landholders.⁷³ The Act was regarded as "one of the best enactments bearing on native policy ever passed" and as representing a compromise between native and European systems.⁷⁴

The Act had indeed much to commend it because it recognised the need to make more land available for Africans particularly those successful in agriculture. It might also be credited for simplifying the registration process as well as proscribing the transfer of land to whites. This was later strengthened by the stringent procedure for the transfer and registration of land under the 1969 Land Regulations. The conveyance for transfer had to be endorsed by a family meeting, the local chief and supported by a declaration of the transferor's wife if applicable. The transfer must also contain a declaration that the purchaser is black.⁷⁵

Although these requirements did make African land rights seemingly secured, the overall impact on land already dispossessed was minimal. Indeed, the Act was designed to transform Africans into migrant labourers.⁷⁶ It made the African politically weak because the tenure granted by it was considered communal thus disenfranchising them under The Representation of Voters Act of 1887. Furthermore, while s 5 of the Act expressly proscribed the mortgaging of the land, it was possible to sell the land to realise a debt.⁷⁷

Introduction

Gray (2002: 211) who posits that land law and human rights are not natural bedfellows has identified some reasons for their apparent differences. Firstly, he states that human rights are based on the idea of the intrinsic worth or dignity of the individual. For Gray, because human rights stress concern for the other person, it is antithetical to popular ideas of property whose key element is the idea of personal appropriation with its inherent tendency of the exclusion of others.

Secondly, human rights belong to the public law domain while property law belongs to the private law domain. This divide appears to make each seem distinct with distinct intellectual incidents. Finally, the author observes that because in most societies the distribution of land is clearly settled, disputes over land are seldom seen as raising human rights issues. (Gray 2002: 212), however, notes that claims on the basis of aboriginal title, systematic ethnic displacement and dispossession raise human rights considerations⁷⁸.

From the author's analysis, South Africa's legacy of dispossession characterised by (Lahiff 2004:1) as a key feature of the country resulting from centuries of the forced removal of blacks from the land through racially discriminatory laws and practices brought the country's land question within a human rights context. The incorporation of the property clause (section 25) in the Bill of Rights generally and the specific provision in ss 25(2)-(7) requiring property to be expropriated for equitable redistribution was a logical response to the country's legacy of dispossession. This chapter examines the conceptualisation of land rights as a human right and does so with the view to ascertaining how this form of property formulation has improved on access to land by the previously disadvantaged.

Rights to land as a human right: an african perspective

Relations to land amongst indigenous South Africans were not determined from an isolated individualised dimension as articulated by the European classical theory of ownership. It is in this light that (Moleah 1993: 85) posits that the indigenous community is seen as a world of ordered relationships with the group assuming prominence.⁷⁹ Land, as the most vital resource is considered as belonging to the group with each individual member having access to it according to need. The chief is

referred to as the owner of the land and is, in this role, responsible for its equitable distribution.⁸⁰

Although considered as owner, the chief does not take actual possession of the land. Since distribution is based on need, every family is entitled to land for building and cultivation. Clearly, where land is available, the chief cannot deny access to a family because this will be contrary to the custom which governs the exercise of his authority.⁸¹ This method of indigenous management of land led to the creation of rights of access to land corresponding to the present human rights conceptualisation of property.

The chief was and still is under an obligation to rule in a sensitive and responsible manner. It is not uncommon among certain African communities for a chief to take an oath during his investiture to rule in accordance with the advice of the people. After noting that some pre-colonial African societies reserved in the people the right to dethrone a dictatorial chief, (Moleah 1993: 85) observes that the management of land with particular reference to access to it by members of the community was one area of sensitivity for which his actions were carefully watched. Land was tied to the family identity and dignity because of its ritualistic significance.

Besides outright dethronement, respect of the chief's obligations was secured through a variety of mechanisms. A chief, who disregarded customary rites, including those associated with land, would be checked by members of his own family or clan. Unlike the present confrontational methods of enforcing modern rights, the traditional African society according to (Said 1979: 88) had a preference for resolving these problems in a manner that would not result in public opinion building up against the chief. It may be concluded from the argument by (Singer 1996: 77) that a classical view of property in which land is regarded exclusively in terms of the relationship between it and the individual owner is flawed, and that the African view of property was better.⁸²

Land in the Bill of Rights

Sachs (1990: 4) criticises the pre-independence debate on the Bill of Rights as thematically limited and out of date because of its undue concentration on first generation rights.⁸³ One of the reasons why this was so is the fact that those involved in the debate were, in the main, beneficiaries of apartheid policy who unconsciously found themselves seeking to protect the privileges of apartheid. These people believed that the extension of the vote was fundamental because it would lead to majority rule and the elimination of oppression implying thereby that it

was unnecessary to specifically protect socio-economic rights such as the right to land.

However, the vote in South Africa according to (Sachs 1990: 5) could have been devoid of meaning if it did not lead to 'the achievement of second and third generations' rights'. The victory of the vote would certainly have been a hollow one if it did not address seriously the issue of land from a human rights perspective by constitutionalising the right of the dispossessed to the restoration of their land. A comparative study of the development of bills of rights shows that they usually evolve under certain peculiar circumstances, most of which were present in South Africa.

The *Magna Carta*, the US and French Bills of Rights were adopted as a direct response to gross human rights abuses.⁸⁴ They were all in one way or another, the result of a reaction by the victims of arbitrariness and oppression in the same way as s 25 was a reaction to the dispossession of African lands under apartheid. Indeed, the United Nations Declaration of Human Rights of 1948 was itself a product of the profound shock which characterised the barbarity of Second World War abuses. Another significant element of bills of rights is that they were invariably adopted by the victorious party and had, as their principal goal, the rooting out of the abuses perpetrated by the defeated regime.⁸⁵

That land raised a human right question was unquestionable. The new South Africa had to root out a land policy in which the minority white government had reserved for themselves about 80 percent of the land. In such a situation, land which has always had a distributive element inevitably had to be conceived as a human right issue. It is this that explains why the starting point of post apartheid democratic constitutionalism was the idea that the country belongs to all who live in it. This realisation made it imperative for the constitution to lay the framework for a just and equitable redistribution of land amongst the dispossessed.

Sachs (1990: 7) argued⁸⁶ that such redistribution should not be subject to the payment of compensation for those from whom land may be expropriated for the purpose. The author felt that to do so would be requiring the impoverished victims of dispossession to pay their oppressors for dispossessing them. He also argued that it would be necessary to introduce affirmative action to adequately deal with the abuses of the past. Constitutionalising access to land was, in this author's view, a crucial first step to the elimination of the inequalities of the past.

Access to land has historically been structured into a framework of human rights and was so expressed in the pre-independence debate. Even Brook (1990: 28)⁸⁷ who supported the arguments of the opportunistic

campaigners driven by the selfish motives to protect property acquired under apartheid, conceded that property rights could be unjustly acquired. This author, nevertheless, still asserted that socio-economic rights such as those relating to land were inappropriate to be declared as justiciable rights.⁸⁸ He was to this extent providing a theoretical defence for private property in response to the uncompromising critical views against land dispossessions by Albie Sachs.⁸⁹

The earliest instruments to proclaim inherent rights of the individual were the Virginia Declaration of Rights of 1776. This declaration demonstrated the fact that the foundation of the American Independent Constitution was based upon a human rights foundation. France, a country with immense international prestige, has a constitutional superstructure predicated on a human rights foundation.⁹⁰ In the opinion of (Van der Vyver 1996: 463)⁹¹ property rights featured prominently in these declarations which he describes as early freedom charters. He notes that the Fifth Amendment to the American Constitution protects property while the French declaration regards rights to property as inviolable.

Land as a human right

Beneficiaries of apartheid policy who unconsciously found themselves seeking to protect the land they acquired under apartheid opposed the idea of making the right to property a human right. In spite of this self-seeking attitude, the conceptualisation of access to land as a human right was inevitable from a black South African perspective. This conceptualisation is structured within an African context which stresses the intrinsic link between the African's identity and his land. This context, (Moleah 1993: 153) observes was vividly captured by an African chief who noted that 'from our ancestors we got the land which cannot be given up because without land we cannot be.'⁹²

The conceptualisation of access to land as a human right in post-apartheid constitutions was neither a benefice from the emerging ANC political leadership nor a product of Europeanised conceptions about rights. It was a recognition that in a country where the majority believed that their birthright to land had been stolen by a settler race and relate this robbery to the homelessness and poverty amongst black South Africans, majority rule would be meaningless without land. The constitutionalisation of property in South Africa was a response to the gross inequality in the distribution of land between black and whites which resulted from the taking of the ancestral land of the former.

It is in this light that this study addressed the question whether section 25 of the 1996 constitution which defines access to land as a

human right protected the victim of the unjust conduct (which had been condemned by all mankind as a crime against humanity), or its beneficiaries. This study seeks to demonstrate that the requirement for the payment of compensation for expropriation of land for land reform appears to have tilted the balance in favour of the latter and generated reactions such as the recurrent land invasions in the country.

Land invasion and the priority of land rights

The Zimbabwean Supreme Court in *Commercial Farmers Union v Minister of Land & Rural Development & Others*⁹³ obliquely criticised the regime when it condemned land invasions for causing the overthrow of the rule of law and breeding violence. There are parallels between Zimbabwe and South Africa in this respect as the Constitutional Court expressed similar concerns in *Government of South Africa & Others v Grootboom & Others*⁹⁴. Reference has to be made to the virulent criticism of the police by the judge at the High Court in *Mkangeli & Others v Joubert & Others*⁹⁵ suggesting that the police tend to stand by while the fundamental rights of private property owners are breached in the course of land invasions.

Although admittedly human rights are sometimes abused in the course of these invasions, there is still a need for a dispassionate interpretation of the phenomena. The tendency to stress the violence incidental to invasions at the expense of its land redistributive elements reflects a trend that ignores the fact that people are still suffering from the massive dispossessions of the past. The stress on violence and the so-called unlawfulness of the invasions appears a convenient strategy to frustrate the restoration of dispossessed land in the southern African region.

Klug (1996: 161)⁹⁶ identified land invasion as constituting one of the six ways in which individuals and communities can obtain access to land. In a study on agrarian land reform in South Africa the author argues that:⁹⁷

if the process of restitution and allocation do not provide access to land, the communities will have no options but to resort to land invasions. Unfortunately, the history of land reform around the world demonstrates that land invasions, which governments normalise through legal processes of expropriation and allocation, have been the most common and effective processes of land reform.

It does not require any imagination to establish a link between land invasion and land redistribution. History is replete with examples of the landless poor in desperate situations inevitably resorting to land invasions as a means of accessing land.⁹⁸ *Government of South Africa & Others v*

Grootboom & Others,⁹⁹ *City of Cape Town & Others v Rudolf & Others*¹⁰⁰ and *Mkangeli & Others v Joubert & Others*¹⁰¹ all involve high profile invasion of land by poor landless people in desperate need of accommodation in the country.

The reluctance by the police to enforce court orders, evicting land occupiers in both countries should be construed in the context of the view that land invasion is under certain circumstances an effective mode of acquiring land. Police reluctance to enforce court orders evicting land invaders which is a common feature in the southern African region was in *Modderfontein Sgatters v Modderklip Boerdery (PTY) Ltd*¹⁰² attributed to a recognition 'that the issue is not simply one relating to the enforcement of a court order.' The court noted rather that 'it is intimately connected to the larger legal, social and political issue of access to land'.

The hands-off approach of the police (including sometimes the administration) in South Africa in matters relating to the eviction of land invaders must be interpreted within a context that takes account of the fact that white settlers who first invaded the region also committed human rights violations. (Chitiyo 2003: 1)¹⁰³ notes in this regard that besides the land seized and the livestock confiscated, the colonial invaders also killed scores of Africans. The concern of the international community over land invasions in the southern Africa region is open to skepticism. Indeed, (Koch et al 2001:154) criticises members of the international community (particularly western tourists) who conveniently patronized national parks to watch game occupying lands from which local people had been driven.¹⁰⁴

The recurrent invasion of white owned lands by homeless black South Africans and attempts to evict them invariably raise the conflict between s 25(1) right and the right of the homeless to access land under s 25(4)-(7) and 26(1).¹⁰⁵ Each of such decisions represents an attempt by the courts to synthesise these contending rights. It will appear however from both *Government of RSA v Grootboom*¹⁰⁶ and *President of RSA v Modderklip Boerdery (Ph)*¹⁰⁷ that the courts proceed from the assumption that the synthesis is meant to establish a balance between protecting private property and the need to achieve equitable access for landless black South Africans.

However, a reflective interpretation of the latter case will show that the courts prioritise private property at the expense of access to the landless. In *President of RSA v Modderklip Boerdery (Ph)*¹⁰⁸ after noting that people resort to land invasions because they have no where else to go, the court held that the refusal of the more than 40,000 landless people who invaded the land of a single corporate body to obey the order evicting them breached s 25(1). This decision which in substance shifts the balance

in favour of a single private property owner as against 40,000 homeless persons must be criticised. A better view would have been to hold that the invaders were forced by circumstances to seek to ventilate the rights prescribed by s 25(2)-(8) and to order the state to compensate the land owner on the basis of s 25(3).

It is curious that after decrying state attitude to the right of the homeless to land and noting that neither Government's medium nor long-term plans provide any solution to the problem of homelessness, the court described the occupiers (of what after all was vacant land) as being in breach of s 25(1). The declaration that the invaders have a right of access to housing pursuant to s 26(1) and should be on the land until alternative land is found for them by the state is revealing. Yet, in principle, this does not detract from the conclusion that the balance has been shifted in favour of private property.

The right to housing in s 26(1) is a constituent element of the right to access land. Although the symbiotic link between housing and land is conceded, the author is nevertheless critical of the reference to housing rather than land in the *Modderklip* case. The reference to housing beclouds the fact that what every landless black person wants is a small piece of land on which to build the most basic home. To this extent, the reference to housing with its budgetary implications was a deliberate access limiting slant to the disadvantage of the dispossessed. Besides, the award of damages to the landowner on the basis of s 12(1) of the Expropriation Act 63 of 1975 disregards the fact that the cost element has slowed land redistribution in the country and thereby helps to maintain the status quo in property relations between black and white South Africans.

It is no coincidence that the judges in *Mkangeli* and *Modderklip* cases are white South Africans. Their legalistic conclusions which clearly tilt the balance in favour of private property predominantly in the hands of white South Africans may be legitimately interpreted as intended to provide support to their racial constituency either consciously or otherwise. Indeed, (van Der Walt 2001: 63) had noticed a similar synergy between apostles of apartheid and judges which helped provide legal justification for the dispossession of the lands of black South Africans. White South African judges have in the view of (Plasket 2002: 560) sometimes displayed a high degree of executive mindedness and much of this is reflected in the denial access to land by natives.

The Supreme Court of appeal in the *Mkangeli* case recognised the trend amongst some judges to be so attitudinal fixed to the past as to render themselves incapable of adapting to the present property dispensation which ought to prioritise access to land for the dispossessed.

Since the court also expressed concerns that such fixation has led to the inability of some judges to credibly discharge their oath in cases dealing with access to land for the dispossessed, it has become imperative for the government to accelerate the training of African judges.

Land in international human rights law

The issue of land in international law is treated here only to the extent that it provides a comprehensive picture of access to land as a human right. The South African property law model, which regards access to land as a human right, is consistent with what obtains under international law. This conceptualisation of access to land as a human right is also logical because the dispossession of Africans from the land was initially justified by the international law concept of *terra nullius*. It is, however, recognised that international law has been criticised for not showing much interest in property law.¹⁰⁹ Property rights, according to this view, are no big deal in international law.¹¹⁰

In spite of the above criticisms, a careful analysis of the International Covenant on Economic, Social and Cultural Rights of 1996 (ICESCR) reveals that international law is interested in the creation of a universally humane property regime. Article 11.1 of the ICESCR provides that ‘the state parties to the present covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing.’

It is obvious that some important issues stand out from this provision. The first is the endorsement of a universal right to adequate housing in the member states of the United Nations, which right is considered as interconnected to the broader aspiration of the universal attainment of a humane living standard in the world. Secondly, this right to housing inevitably includes access to land on which houses are built and that the covenant specifically intended this interpretation.

Moreover, the penultimate provision of Article 11.1 imposes an obligation on state parties ‘to take appropriate steps to ensure the realisation of this right’. This shows that the provision was not intended as serving merely to exhort state parties and provide international legitimacy for socio-economic policies. It was meant to lay down a duty under international law which may be enforceable through the municipal courts of member states in appropriate circumstances.¹¹¹ The reliance by the amici in the Grootboom case on article 11.1 of the Covenant was consistent with the intendment of the treaty (although it had not been ratified) because the Covenant was meant to operate beyond the realm of beatitudes and declarations.¹¹²

The value of the property rights above may be deduced from the comments of the United Nation's Committee on Economic, Social and Cultural Rights, which is a significant interpretational guide to the provisions of the covenant.¹¹³ By comment 3 in paragraph 10 of the Committee's general comment of 1990, it is apparent that socio-economic rights (e.g. Article 11.1) contain a minimum core below which no state will be permitted to ordinarily fall. The Committee describes this core as requiring the satisfaction of 'at the very least, minimum essential levels of each of the rights incumbent upon every state party' and argues that:¹¹⁴

a state party in which any significant number of individuals is deprived of... basic shelter and housing ...is prima-facie failing to discharge its obligation under the covenant. If the covenant were to be read in such a way as not to establish such a minimum core obligation it will be largely deprived of its raison d'être.

In *Government of South Africa v Grootboom*,¹¹⁵ Yacoob, J. recognised the idea of a minimum core in international law, which should be determined by "having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question." Although the covenant was during arguments in the *Grootboom's case* yet to be ratified, Yacoob J was prepared to adhere to the minimum core notion as applying to South Africa.¹¹⁶ It is not only with reference to the idea of minimum core that the South African courts have tended to stress the human rights nature of access to land. They have also done so through the contention that every child is entitled to shelter.

Although the High Court dismissed the application of the applicants holding that their right to housing under s 26 was not violated, it decided that the applicants who had children were entitled to housing. The *Grootboom* decision for all practical purposes meant these children were entitled to land from the state. The right was in the court's view a derivative of s 28 (1) of the 1996 Constitution giving every child an unqualified right to shelter. The court rationalised the success of the parents on the grounds that to do otherwise would 'penalise the children and, indeed, their parents, who, to a considerable extent owing to the ravages of apartheid, are unable to provide adequate shelter for their own children.'¹¹⁷ The problems of homelessness that led to the invasion of the land, the subject of the *Grootboom case*, was loosely traced to dispossessions caused under apartheid.

The right to access housing in s 26 (1) is an important element of the post-independent property framework. This right is a constituent element of the right to access land since there is no conceivable way of providing housing without first securing access to the land on which the houses are built. Indeed, the court in the *Grootboom case* contextualised the human

rights significance of access to land by noting that the land invasion in the case raised issues relating to the constitutional values of human dignity, which cannot be separated from the idea of a humane property regime that state parties are expected to create.

It may be observed that s 26 (1) secures to everyone the right to have adequate housing. The section, however, does not have provisos similar to s 25 (6) and (7) which grant access provided on the basis of past racially discriminatory laws and practices. While the scope of the access covered in this study is circumscribed by the fact that it is a response to dispossession, the access in s 26 is constitutionally open to everyone. Admittedly s 26 (1) will deal with issues of housing for those whose capacity to continue to access it was affected by evictions carried out by white land owners, pending the coming into force of Land Reform (Labour Tenants) Act 1996¹¹⁸ because the Act addressed racially discriminatory laws and practices.¹¹⁹

Access to housing as broadly provided in s 26 (1) could also be achieved by measures to open up the rents market, yet there is the danger that this might be problematic in the sense of impacting negatively on land reform. Following the broad construction of arbitrary deprivation to property under s 25 in the FNB¹²⁰ case, it is plain that any profound restriction on rentals for property would lead to a flood of litigation. (Van der Walt 2004: 83)¹²¹ has noted that the reason why until date there has not been any serious challenges to land reform legislative measures is the strong sympathy the programme enjoys because of its popular ring of legitimacy. The author opines that the same legitimacy cannot be enjoyed by an attempt to facilitate access to adequate housing for everyone through the opening up of the rent market.¹²²

The constitutional property clause Property in the interim constitution

Introduction

The interim constitution that became operational in April 1994 officially introduced democratic governance, a bill of rights and other guarantees. Section 28 of this constitution was novel in so far as it made reference to rights in property, thereby heralding a new land regime in the country. However, this new land normative structure could, when seen from an African perspective only produce a truncated land right model since the multiparty negotiation process (MPNP) which led to it was characterised by a great deal of horse-trading.

The compromises made during the negotiations raised in the opinion of (Basson 1994: xxii) concerns about the legitimacy of the constitution itself.¹²³ The minority government and the parties supporting it, for instance, insisted that the MPNP should enact the constitution instead of it being promulgated by a democratically elected constituent assembly. Overall, the property clause which emerged in s 28 of the interim constitution creating 'rights in property,' can be better understood when seen in the context of the above manoeuvres¹²⁴. This analysis of the property clause under s 28 focuses on the impact of the protection it offered to the dispossessed.

The manner in which s 28 is formulated prompted (Kroeze 1994: 326)¹²⁵ to conclude that it was adopted to avoid the pitfalls of the known property clauses. According to the author, s 28 had the effect of displacing ownership from its traditional place of primacy in South Africa. In spite of the author's adoption of this view, he nonetheless expressed the opinion that s 28(1) could be interpreted so widely as to result in an extremely wide entrenchment of existing rights in property that was not contemplated by the negotiating parties.

Although (Kroeze 1994: 327) saw the possibility that a reactionary judiciary intent on frustrating the reconstruction of society to redress the land related injustices of the past could easily exploit such a formulation, he failed to recognise that some of the negotiating parties had clearly foreseen both possibilities during the negotiations. Naturally, those who benefited from the inequality of the property distribution of the past would consider such a result a worthwhile negotiating aim.

During the negotiating process, two viewpoints emerged with regard to the property issue, namely, the libertarian and the liberationist view of fundamental rights. The former who were white liberals (supported by

government and the Inkatha Freedom Party) believed that there should be a comprehensive bill of rights in the interim constitution.¹²⁶ In point of substance, they stressed the question of the dignity of the human being and argued for the protection of land in the constitution in very clear terms.

The liberationists, on the other hand, were the African National Congress (ANC) delegates who believed that the interim constitution should contain only minimal rights. They argued that the protection of property in the constitution would fossilize the existing land distribution in the country. Although ordinarily liberationists would advocate for a fuller bill of rights in a constitution, (Lourens du Plessis 2003: 3) notes that the ANC took this unusual course in order to counteract the constitutionalisation of property in such a manner as to act as a stumbling block to the envisaged land redistribution.

Section 28 of the 1993 constitution

Section 28(1) which asserts that 'Every person shall have the right to acquire and hold rights in property and to the extent that the nature of the right permits to dispose of such right' positively identifies or creates a right in property. This provision was, according to (Carpenter 1995: 273) made up of two separate rights viz: the protection of existing rights in property and access to such rights¹²⁷. It is apparent from this author's view that in the context of the current land distribution in South Africa, this provision meant the entrenchment of the existing property privileges. This conclusion is evident from the author's further argument that the provision does not expressly constitutionalise any claim on the part of those who wish to acquire a right in property.

The view that existing rights and access to them are protected by s 28 is compelling in the light of subsections 28(2) and (3) of s 28 which refer to existing rights that are individual in character. In the absence of a provision similar to that of s 25(4) of the 1996 Constitution, the conclusion that s 28 did not contemplate any substantial post independence redistribution of land is strong. Yet, it may, however, be observed that the phrase 'every person has the right to acquire land and hold rights in property' in s 28(1) has a futuristic element which could be construed to refer to the rights of the dispossessed to acquire land. It could be suggested that to this extent, it may be considered as a vital redistributive element. It is doubtful whether this rather curious and oblique way could have been adopted in dealing with what was certainly the most pressing problems of the new South Africa.

Although the transitory character of the interim constitution made it impossible for these issues to be judicially addressed,¹²⁸ (Van der Walt

1993; 302) identified three possible approaches in dealing with the definitional difficulties in s 28. From the author's illuminating analysis, the section may be characterised into (a) a positive guarantee of property, (b) negative guarantee of property and (c) a positive guarantee of the institution of property. The author argues that approaching the definition of property from the positive guarantee perspective is problematic because it can hardly lead to a positive claim to a right in property against the State. Such a guarantee as (Van der Walt 1993: 302) concludes would not create a formidable property right.

The negative guarantee, on the other hand, is regarded as the classical mode of property protection.¹²⁹ This method of constitutionalising property is called negative because it is always couched in negative terms – 'the state shall not take property' or some words to a similar effect.¹³⁰ Section 28(2) is a typical negative formulation of a private property right under the interim constitution.

Although (Van der Walt 1993:302) identified his third formulation as creating an economic model of property ownership which establishes private property, the author opines that this interpretation was not anticipated by the drafters of the interim constitution. He notes however that it is a major feature of the German constitutional theory which in his analysis of s 28 is based on 'an obligation in terms of which the circumstances must be maintained within which it is possible for individuals to acquire, hold and dispose of rights in property (Van der Walt 1993: 303).'

The immediate consequence of this definition was that an individual could not bring an action against the state where private property rights were involved under s 28 (1). Such an action could only have been possible where the state takes a positive action such as the abolition of the institution of private property by means of legislation. It is debatable whether this interpretation is correct. Indeed, the learned author himself opines that the implication of such interpretation would be that a market system model was created in terms of the government's declared policy of a mixed economy. Such an interpretation is, in the writer's view, objectionable because of its potential for impairing access to land for the dispossessed rural and urban poor.

In the light of the short lifespan of the 1993 Constitution, there is no way anyone can conclusively say which of the possible meanings ascribed to s 28 is correct because, besides the textual interpretation on which there is unanimous acceptance, various other models are regarded as providing modalities of interpretation used by Constitutional Court.

From the analysis of the various interpretations discussed so far, one feature which has come out clearly is the fact that there are two

contrasting positions on s 28 of the interim constitution, namely, that it may be construed as protecting private land rights of whites or that it was a very weak Property Clause that did not protect existing land rights. In the light of the strong opposition to the entrenchment of private property privileges, even amongst some judges prior to the enactment of the 1993 Constitution, it would seem that the suggestion of a weak Property Clause is plausible.¹³¹

Section 25 of the 1996 constitution

Introduction

This aspect of the discourse is concerned with an analysis of the structures contained in s 25 of the 1996 Constitution. Drawing inspiration from the German approach to the constitutional protection of property, (Kleyn 1996: 416)¹³² expresses the view that the purpose for constitutionalising property is to ensure the balancing of private and societal interests over land. He was, however, quick to concede that this responsibility would be particularly taxing 'in the light of the gross inequalities regarding the distribution of property.'¹³³ The conceptualisation of the Property Clause in this fashion is persuasive and has much to commend it.

There is an obvious dichotomy (even from a most casual observation of s 25) between the individual freedom to hold property (land) and the social function of property. Although couched in negative terms, s 25(1) recognises that the individual is the holder of a proprietary right which is further enhanced by the express provision in s 25(5) guaranteeing the individual's access to land. Kleyn (1996: 416) interprets these provisions as demonstrating a 'clear manifestation of the worth of private property for the realisation of individual freedom and above all human dignity.' It would seem the author's analysis supports the idea that constitutionalising property was imperative to accomplish human dignity. It is for this reason that this study argues that creating access to land for the dispossessed should be prioritized because it falls within the human rights domain.

Private property and the public purpose to facilitate access to land for the dispossessed

From a casual view of the provisions of s 25, it may seem that the concern to maintain a delicate balance between individual rights to property and public interest is a major feature of this provision. Following the German constitutional approach, (Kleyn 1996: 414) argues that there is a clear manifestation of individual rights in property existing alongside an equally clear constitutional limitation of private property in the interest of the public. According to this author, the function of the Property

Clause in Article 14 of the German Basic Law of 1949 was described by the German Federal Constitutional Court as maintaining a delicate balance between the tensions of personal freedom to own property and the social function of the property.¹³⁴

It may be observed that the German court in the *Deichordnung case*¹³⁵ had no difficulty in holding that the public interest which led to the taking of private land (the prevention of floods) justified a shift in the balance between private ownership of the land and the public control of it. This case was subsequently followed by later decisions, which widened the scope of the interference with property for public interest. (Kleyn 1996: 411) has applauded the public context influence in the interpretation of the Property Clause as necessary to harmonise the conflicting values in Article 14 of the German law. The alternative view that the Property Clause solely functions to ensure a material basis for personal freedom is criticised by the author as resting on a one-dimensional historical premise that has been stripped of its validity in modern times.¹³⁶

A similar tendency towards this functional or purposive approach is discernable in American law. (Van der Walt 1997: 11) identifies Frank Michelman as the principal exponent of this interpretative approach to the Constitution in America. The approach stresses the need for the abandonment of the assumption that a case-by-case interpretation of the Constitution should be the prime method to be adopted. It insists on a return to the first principles, this being the adoption of a method whereby a clear understanding of the purpose behind the provision in the Constitution underpins constitutional interpretations. This approach emphasises a movement away from a private law conception of the constitutional property provision as guaranteeing the status quo to a dynamic public law ethos that regards the Property Clause as a vehicle for social change and transformation.¹³⁷

Van der Walt (1997: 15) has argued for a South African adoption of the German constitutional interpretation approach. According to the author, the German constitutional approach has the added advantage of adopting a holistic view of the entire constitution. This style of constitutional construction in the view of the author demands that none of the provisions of the Bill of Rights be construed in isolation. Each has to be construed relative to other provisions in the Constitution because:¹³⁸

the functional or purposive approach explains many of the otherwise perhaps bewildering elements of current constitutional jurisprudence, that is it has some advantages compared to some old style formation...

An approach of a constitutional interpretation of the Property Clause, which seeks, as its basic objective, the maintenance of the balance

between private and public interest, has much to commend it. Yet, this does not justify regarding the German approach as providing the main inspirational basis for understanding the South African Property Clause. Although (Kleyn 1996: 411) acknowledges this view when he noted Johan De Waal's caution against treating the German Basic Law (and decisions based on it) as a tree from which one can pluck little BMWs, which could happily be driven on South African roads he regrettably dismisses it as fanciful and artificial.¹³⁹

There is, with respect, nothing fanciful about this argument. Section 25 of the Constitution, the foundation of South African property model made private property in subsection 1 and equitable redistribution of land to the dispossessed under the restitution scheme in subsection 7 fundamental rights¹⁴⁰. The constitution further places an obligation on the state in s 7(2)¹⁴¹ to respect, promote and fulfil the Bill of Rights without any distinction. The word promote, when applied to these rights, raises their human rights value because it demands a proactive approach towards their achievement.

It is acknowledged that section 25 did not address the issue of priority between private property and the right of the previously disadvantaged to access land. However, by adopting an integrated approach, this model of property formulation treats private property as at par with the right of the dispossessed to get land. The property clause to this extent reflects a classical theory embedded in Western liberal traditions favoured by post-colonial constitutions because of its tendency to protect past privileges.

This writer contends that equating private property with the right to access land through the restitutionary and redistributive mechanism introduced pursuant to ss 25 (2), (4), (7) and (8) as done by s 25 weakens the property foundation of the country. Looking at this issue with the benefit of hindsight some ten years after, it is obvious that the idea of parity between private property and the right of the dispossessed to access land laid the seed for the subsequent failure of the land reform regime to deliver access to land to the landless poor. The idea of parity in the property clause ignores a dominant feature of the history of South Africa, which is a recognition that land was taken from indigenous Africans in circumstances that remain a source of pain and tension to this date. Similar protection of private property in post-colonial constitutions across Africa has been criticised by (Shivji 1989: 19) as driven by the motive 'to protect the property of settler minorities and foreign companies.'¹⁴²

This writer argues that in a country where the decolonisation and anti-apartheid struggle revolved on the land question, access for the dispossessed should not be equated with protection of property acquired

under apartheid. Rather than stressing protection for lands acquired under apartheid, priority should be given to the redistribution of land wrongly monopolised during the period. The limited access to land by the previously disadvantaged to this point raises serious concerns about whether those made homeless by the skewed land policy of the past can own land in their lifetime in South Africa. Putting private property rights on the same pedestal with the right of the dispossessed to access land under the restitutionary mechanism is unsound in principle because the iniquitous foundation of the former, makes this form of property inappropriate for a human right categorisation.

Both comparative international law and the peculiar history of South Africa support the conclusion that access for the dispossessed is of greater importance to private property. Citing Frank Michelman, (Van der Walt 1997: 11) shows that there is a movement away from a private law conception of constitutional property even in a stable country like the United States of America.¹⁴³ These authors argue that American law disapproves of an interpretation of property that guarantees the status quo, opting rather for a construction stressing a dynamic public law ethos that regards the property clause as a vehicle for social change and transformation. Ackerman J situates this approach in South Africa in the *First National Bank of SA Ltd / West Bank v Commissioner for the South African Revenue Services* and *First National Bank of SA Ltd t/a West Bank v Minister of Finance*,¹⁴⁴ (hereinafter referred to as the *FNB case*) by calling for an interpretation of ss 25(4)-(9) in a context that addresses one of the most enduring legacies of racial discrimination in the past, namely the gross unequal distribution of land in the country.

The contention for the prioritisation of access for the dispossessed reflects the historical realities animating s 25. The tenor of s 25 reveals the following salient features: (a) it permits expropriation of property for public purposes (b) it defines this public interest in terms of a commitment to land reforms aimed at improving access (c) makes express reference to those who suffered as a result of past discriminatory practices as intended beneficiaries of the new land regime.¹⁴⁵ All these clearly demonstrate that the priority lies with promoting and protecting rights derived from the improved access under s 25(4)-(9).¹⁴⁶ Any other conclusion would clearly be unsound in the face of the above compelling features.

From a conceptual standpoint, the right of the dispossessed to access land is different from that of private property which s 25(1) protects. The former, which derives from the nation's commitment to bring about equitable access to natural resources, must rank as the number one public interest in South Africa. Although both are cast as human rights, access to

land for the previously disadvantaged is more important. However, from the rapid development of shanty towns (in most South African cities) swelled by former black farm workers continuously being evicted from white own farms¹⁴⁷, it is apparent that private property rights have so far triumphed over the right of the previously disadvantaged to gain access to land.

Although one is mindful of the provisions of s 39(1) (b) and (c),¹⁴⁸ one nevertheless, feels that in interpreting the Constitution, the courts should not be overtly concerned about the balancing of interests between the conflicting private and public forces over land. The present writer is in favour of the approach adopted by the Canadian courts because in matters of land, the country shares a lot with South Africa. Indeed, (Allen 2000: 202) notes in this regard that 'there is little doubt that the crown made similar undertakings with, and assumed similar powers over aboriginal peoples throughout the empire.'

Reference is made to the fact that the Canadian Supreme Court ¹⁴⁹ in *R v Big M Drug Mart Ltd*¹⁵⁰ construed a guaranteed right in the country's Bill of Rights in the context of 'the historical origins of the concept enshrined' in the Charter. The same court held in *Hunter v Southan in Co*¹⁵¹ that constitutional interpretation must be undertaken with the deliberate purpose of attaining the 'political and historical realities' of the state even if its framers did not contemplate these realities.¹⁵² The court said that the task of expounding a constitution is crucial and considered different from that of construing an ordinary statute.

The Canadians have a comparable historical experience with South Africa since in both countries an emigrant European administration dispossessed indigenous inhabitants of land. (Marcus 1994: 95) has identified a discernable preference for the Canadian constitutional interpretational approach by Southern African countries just emerging from colonial rule. Ackermann, J. preferred an interpretation which will take the specific historical context of the country into account, specifically, observing how this was consistent with s 25(4)-(9) which enjoins the need to redress 'one of the most enduring legacies of racial discrimination in the past, namely the gross unequal distribution of land in South Africa.'¹⁵³

An undue stress on balancing the contending rights of the public interest in ensuring access to land for millions and the protection of private property of a few is flawed because it creates the untenable idea that both have proportional worth in the context of South Africa. This type of interpretation of the constitution is, with respect, not in tandem with the broad principles indicated in the *FNB case*. It is conceded that the Property Clause in s 25 must be construed as a whole and that this

demands the need to strike a balance between existing rights and the public interest.¹⁵⁴ The writer, nevertheless, argues that if this has to be done in a spirit that views property as an instrument of transformation and change, an access facilitating interpretation will be preferred.

The present writer is not against the purposive approach or the reliance on German precedent as such, but is concerned with the apparent overly concern with the balancing of interest. The Constitutional Court has, in *S v Zuma*¹⁵⁵ and *S v Makwanyane*,¹⁵⁶ already made its preference for a purposive interpretation of the Bill of Rights clear. I am simply observing that from a careful reading of the *FNB* judgment, it would seem that “purpose” refers more to the interest which a particular provision and the Bill of Rights as a whole was enacted to protect. The Court quite correctly stated that this interest has been specifically identified by s 25(4)-(9).¹⁵⁷

In dealing with s 25 rights, one should not be unmindful of the provisions of s 39 which according to (Scott et al 2001: 218) provides the animating values that must inform the interpretation of the constitution. Although this provision specifically requires international law to be considered in the adjudicative process,¹⁵⁸ s 39 however stops short of indicating what principles may or may not be followed. The courts are thus given the discretion to decide on how to proceed on this point. In *S v Makwanyane*,¹⁵⁹ the Constitutional Court held that the international human rights law provides a framework within which Chapter 3 of the interim constitution had to be understood and construed. The President of the Court indicated that judicial acts of relevant international human rights bodies, such as reports and decisions might provide guidance for the construction of the Bill of Rights.¹⁶⁰

The courts are enjoined by s 233¹⁶¹ to be guided by two rules when construing pieces of legislation, namely, that the interpretation be consistent with international law as well as be reasonable. The word ‘reasonable’ has not been defined, but it must be construed to imply an interpretation that will serve to achieve the purpose for which the particular provision was designed. ‘Reasonable,’ as defined here is consistent with the view expressed in the *FNB case* where the court noted that context (legacy of dispossession) was crucial in construing s 25. Thus, a particular interpretation may be consistent with international law, yet unreasonable in the unique historical context of South Africa.

This writer argues that by s 233 and s 39(1)(c) of the 1996 Constitution, the courts in South Africa are ultimately to be guided by the peculiar and unique circumstances of South African land history when interpreting s 25. It is from the above obvious that because of the peculiar land history of the country, international human rights law and foreign

law cannot be the all-important guide for the interpretation of s 25, although they help to avoid the mistakes that others have fallen into.

Nature of property clause in section 25

Although this provision has been the subject of controversy, covering a wide range of sentiments and sometimes even ideological biases, the discussion here is not intended to cover the extensive range of issues associated with these arguments. The focus is on how s 25 has affected access to land by the dispossessed. The section reads thus:

- (1) "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*
- (2) Property may be expropriated only in terms of law of general application -*
 - (a) for a public purpose or in the public interest, and*
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to those affected or decided or approved by a court.*
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interest of those affected, having regard to all relevant circumstances, including -*
 - (a) the current use of the property;*
 - (b) the history of the acquisition and use of the property;*
 - (c) the market value of the property;*
 - (d) the extent of direct state of investment and subsidy in the acquisition and beneficial capital improvement of the property; and*
 - (e) the purpose of the expropriation.*
- (4) For the purposes of this section -*
 - (a) the public interest includes the nation's commitment to land reform, and reforms to bring about equitable access to all South Africa's natural resources, and*
 - (b) property is not limited to land.*
- (5) The state must take reasonable legislative and other measures within its available resources to foster conditions which enable citizens to gain access to land on an equitable basis.*
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.*
- (7) A person or community dispossessed of property after 19 June 1913 as a result of past discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.*

*(8)No provision of the section may impede the state from taking legislative and other measures to achieve land, water and related reform in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).
(9)Parliament must enact the legislation referred to in subsection (6).”*

This section has for the purpose of this book been divided into two distinct parts. The first part (subsections 1-3) protects and delimits existing property rights, while the second part defines a land reform policy.¹⁶² Another illuminating categorisation of this section would divide it into rights created by s 25 and the limitations to these rights. Neither of this compartmentalisation should be seen as setting watertight boundaries. In the discussion that follows, the writer will comment on the rights created by s 25 and the limitations to the rights in Section 25.

Rights created by section 25

It is significant that s 25(1) is couched in negative terms. Why did the framers choose to cast this very vital provision by saying ‘no one may be deprived of property except in terms of ...’?¹⁶³ The choice of this negative formulation is relevant for two reasons. Firstly, the rest of chapter two of the Constitution (with the exception of s 13 and s 20) are positively drafted. Secondly, s 28 of the 1993 interim constitution was positively phrased.

Van der Walt (1997: 295) has strenuously contended that this negative formulation shows that s 25 neither created nor guaranteed property. Section 25, according to this view, conferred a comparatively limited right called ‘the right not to be deprived of property’ except in the circumstances specifically prescribed in s 25(1)-(3).¹⁶⁴ This right not to be deprived, it is argued, is narrower than the rights in property under s 28(1) of the 1993 constitution.¹⁶⁵

Moreover, the same author notes that the difference between s 25, which is negatively formulated, and the other provisions in chapter two, which are positively drafted, suggests strongly the conclusion that the drafters deliberately intended to confer something less than an express property guarantee. These arguments are persuasive for two reasons. Firstly, there can be no conceivable reason for this obvious change in formulation in the same chapter dealing broadly with similar issues except that the drafters intended a truncated right to property. Secondly, almost all the other provisions in chapter two commence with a positive affirmation of rights.

There is, as Van der Walt (1997: 297) further notes, a more nuanced variation of this contention, which is to the effect that the grammatical structuring of s 25(1) supports the idea of a less than property guarantee.¹⁶⁶ According to him, had s 25(1) been drafted with two negative phrases, namely, ‘Nobody may be deprived of property except as provided for by the constitution,’ and ‘No law may provide for arbitrary deprivation of property,’ this would have indicated a general negative guarantee of property. The author argues that the present formulation of s 25 means the Constitution intended the protection of a truncated version of the right to property.¹⁶⁷

We are in agreement with the above interpretation of s 25(1) of the 1996 Constitution. It is consistent with an interpretation which takes into account the unique history of South Africa. The final Constitution appears to have deliberately shifted away from a strong positive protection of rights in property with particular reference to land. This is to avoid a situation where the privileges of a small white elite, which took control of over 80 percent of the land in the entire country, would be entrenched. Such an interpretation is also potentially sensitive to the problem of homelessness and spiralling poverty amongst the black majority.¹⁶⁸ The drafters of the Constitution must have been wary of positively protecting property rights for fear that it would by fossilising the existing imbalance make access to land for the dispossessed difficult.

Judicial interpretation of property clause

There are admittedly many canons of interpretation, which should help in construing the Property Clause, but these are not cast in stone and should not enslave the courts. However, the historical approach has apparently enjoyed prominence in the country. Although *Qoqeleni v Minister of Law and Order*¹⁶⁹ dealt with the interim Constitution, it is safe to assume that it signalled a preference for the historical approach because it described the interim Constitution as the remedy to a fundamental mischief in South Africa. This was followed in the specific case of s 25 in *First National Bank of SA Ltd / West Bank v Commissioner for the South African Revenue Services* and *First National Bank of SA Ltd t/a West Bank v Minister of Finance*.¹⁷⁰ The Constitutional Court stressed the historical approach by focusing on the genesis behind the enactment of s 25, which relates indisputably to the systematic dispossession of black people.

According to Lourens du Plessis (2002: 137),¹⁷¹ constitutional interpretations in the country since 1994 seem to have been accompanied by a realisation of the court’s unavoidable political involvements in the broad sense of the word. The Constitutional Court in a series of judgments¹⁷² has expressed its preparedness to adopt an activist political

role when construing provisions dealing with socio-economic rights. In the *Premier Mpumalanga case*, the court expressed its reluctance to impose obligations upon government, which would inhibit its ability to make and implement policy effectively. When called upon to interpret a provision like s 25(1), it is not unreasonable to assume that it would adopt a construction that would disfavour a freeing or consolidation of private ownership.

Ackermann J reiterated the court's policy in *First National Bank of SA Ltd / West Bank v Commissioner for the South African Revenue Services* and *First National Bank of SA Ltd t/a West Bank v Minister of Finance*.¹⁷³ The judge warned that in construing s 25 'one should never lose sight of the historical context in which the Property Clause came into existence.' He went further to identify the background of the Property Clause as one of the conquest 'of land in circumstances that to this day are a source of pain and tension.'¹⁷⁴

In spite of the above access facilitating interpretation of the Property Clause, the situation in South Africa suffered because universally judicial interpretation of constitutional property clauses are no longer used as devices to control¹⁷⁵ the abuse of state powers, as was the case in the 20th century (Roux 2002: 430). Two reasons account for this shift in theory. Firstly, constitution making and interpretation have benefited from the tempestuous relations between the judiciary and the executive, following the former's activism in India and America over the property clause. The American and Indian Supreme Courts repeatedly invalidated legislations, which in their opinion, interfered with private property rights.¹⁷⁶

Secondly, and more importantly, there is an ongoing development of a liberal constitutional theory in the world.¹⁷⁷ (Roux 2002: 453) is of the view that an important feature of this constitutional evolution is the decline in the status given to the property clause as a bulwark of protection against state power.¹⁷⁸ He argues that the dismissal, on technical grounds, of the challenge in *Transvaal Agricultural Union v Minister of Land Affairs and Another*¹⁷⁹ did much to discourage challenges of land reform legislations.¹⁸⁰ While some may consider this development noteworthy as implying success in facilitating access to land, (Roux 2002: 434) generally criticises the paucity of property challenges in the country. In this authors opinion 'the absence of any significant property right cases in South Africa may simply be further proof of the general rule that, where a government is inclined to respect property rights for economic reasons, it will not test the boundaries of the constitutional property clause.'¹⁸¹

Limitations to rights in section 25

The right to land guaranteed in s 25(1), even though rather truncated, is not absolute. Like every other right in the Bill of Rights, an existing right in land needs to be read with reference to the multiple limitations to which it has been made subject.¹⁸² (Van der Walt 1997: 275) classified the limitations affecting the right to land into two broad headings, namely, internal modifiers and limitations properly so-called. Although this classification is fluid and appears to turn on a question of semantics, it is, nevertheless, a useful guide hence it has been adopted as a basis for further analysis on this subject.

Internal modifiers are distinguishable from limitation provisions. The former are contained in or laid down by the Constitution itself. This is done when the Constitution itself, in defining a particular right, indicates what elements are excluded from the right in question. When seen from this perspective, the exclusion of entitlements forms part of the definition of the guarantee in issue. Such an entitlement cannot be amended or even affected by normal legislation.¹⁸³ Sections 25(2) and 25(5) in terms of the above approach regarded as internal modifiers to the definition of property in s 25(1) because the constitution itself has, in defining property made property right subject to these provisions.

Property may be legitimately regulated or controlled (deprivation) or expropriated for public purpose subject to the payment of compensation. Section 25(6)-(9) declares the reform agenda of the 1996 Constitution with the aim of redressing injustice of past discriminatory legislation. In a broad sense, these provisions affect the right to property as guaranteed by s 25(1). Measures which will enable citizens to gain access to land (particularly that demanding restitution of property) must necessarily impact negatively on existing land ownership in the country. Subsections 25(2)–(3) of the 1996 Constitution are internal modifiers because it is the Constitution itself that has provided for them. The restitution machinery was enacted pursuant to and derives its authority from s 125 of the interim constitution.

Limitations of the Bill of Rights are different from internal modifiers. Unlike the latter, limitations are neither contained in the Constitution nor laid down by it. The Constitution makes reference to limitations and thereafter makes provisions for their application. The actual limitation invariably appears in a different law (statute), common law or customary law. Although the Constitution provides authority for their application and control but as (Van der Walt 1997: 307) notes, the laws themselves remain distinct from the Constitution.¹⁸⁴ There are various provisions, which provide for limitations of the Bill of Rights in the 1996 Constitution.

Section 36(1) is an important limitation provision in this context. It authorises the enactment of a law of general application limiting the Bill of Rights, including s 25(1). This limitation is both elastic and extensive hence it is subject to what is 'reasonable and justifiable' in an open-end democratic society. This phrase can be construed to justify wide varieties of interference with proprietary rights in land. Another important limitation is provided in s 39 of the 1996 Constitution. This provision requires that the courts should decline to take decisions, which may be inconsistent with the country's obligations under international law or deriving from her membership of international organisations such as the United Nations and the African Union.

However, in spite of this, it is unlikely that foreign law will be of much assistance in interpreting the Property Clause. Indeed, it is because the specific history and needs of South Africa are peculiar that (Roux 1997: 249) thinks the Constitutional Court was anxious to point out its duty to 'construe the South African Constitution and not an international instrument or the constitution of some foreign country, and this has to be done with the due regard of our legal system, our history and circumstances'.¹⁸⁵

The Property Clause has been circumscribed so much such that it would, in principle, be unlikely for any violation of it not to be capable of justification by reference to a valid limitation. In dealing with chapter three of the interim constitution, the Constitutional Court indicated in *S. v Makwanyane*¹⁸⁶ that the Canadian pattern of resolving questions of constitutional validity has to be utilised. This involves conducting a two-staged enquiry; the first requiring the applicant to show that a right under the Bill of Rights has been infringed, while the second demands that the respondent shows that the breach is justified by the provisions of s 36 of the Constitution.

The point is expressly made in s 25(4) that property is not limited to land and by s 25(6) that it extends to tenurial rights, which are less than ownership. So wide is the scope of property in s 25 that Pickering J stated in *Transkei Public Servants Association v Government of RSA & Others*¹⁸⁷ that it could cover interests such as employment subsidies from the State, including housing subsidy. This may appear startling to those schooled in the traditional notion of property, yet it is consistent with the current trend which recognises the emergence of a new form of property.¹⁸⁸ It is possible for the courts to treat the two forms of property differently. In such a situation, the courts restrict the possibility of interference with the new property form, while adopting a more liberal approach, which will allow greater latitude for interference with land related rights. Such a

differential attitude is in the opinion of this writer consistent with the underlying spirit of facilitating access to land by the dispossessed.

Introuduction

By 1994, when the first democratic constitution became operational, South Africa was faced with two pressing and potentially explosive problems, namely: landlessness and redress. The formulation of a comprehensive policy to deal with these problems was thus one of the principal objectives of the new ANC government. The ANC's inspired (Reconstruction and Development Programme 1994:20) contains an ambitious mission statement and the party's vision to address the issue of access to land as well as the concomitant issue of the improvement of the quality of life for all.¹⁸⁹

The government's policy on land was defined in the reconstruction plan as involving the strategies of the redistribution of both residential and agricultural land to those who need it but cannot afford it, and restitution for those who lost land as a consequence of past discriminatory laws and practices.¹⁹⁰ Redistribution was conceived as a response to landlessness and poverty, while restitution was meant to redress dispossessions. Besides ensuring that their land policy was incorporated in both the interim and final constitutions, the ANC wasted no time in introducing the relevant legislation¹⁹¹ to address the problems of land as it saw it.

This chapter deals with restitution because it was conceived as a mechanism to restore land lost through dispossession. It is significant that the right to restitution for dispossessed land is incorporated in s 8(3) (b) of the interim constitution which was the equality clause. It is thus directly linked to the concept of affirmative action,¹⁹² which has played an important role in addressing a legacy of injustice in important sectors of the society. Most of the important principles of South African constitutionalism were established in the course of the construction of the interim constitution¹⁹³ and have provided valuable inspiration in guarding the interpretation of the final Constitution.

Given the nature of landholding in the country, it was plain that the government's aim to facilitate access to land for the dispossessed would adversely affect the existing rights of ownership. Both s 28(3) and s 25(2) permitted the expropriation of land subject to the payment of compensation. Although the State had abundant reserves of land, the Constitution, nevertheless made provision for land to be expropriated for land reform purposes.

Expropriation

In the face of the imbalance resulting from dispossession in South Africa, there was no way judicial restitution of land could take place in the absence of the expropriation of privately owned land. (Binswanger 1996: 139) asserts that a broad consensus had emerged across the political spectrum that expropriation of the new landowners must be an option.¹⁹⁴ It was thus natural for section 25(2) of the 1996 Constitution to provide for the expropriation of property (land). However, this was made subject to two constraints, namely - for a public purpose or in the public interest¹⁹⁵ and to the payment of compensation. The amount, time and manner of the compensation could either be agreed upon by the parties or arrived at by a court.¹⁹⁶

Although specific reference was made to expropriation, the term was not expressly defined. (Sax 1964: 93) however, traces the concept to Grotius' writings in the 17th century recognising that the monarch could take private property for public purpose subject to the payment of compensation.¹⁹⁷ It seems from the view of (Allen 2000: 97) that the Theme Committee Four advised the Constitutional Committee of the National Assembly that expropriation means compulsory acquisition on the payment of compensation, that the principle in South Africa broadly follows the definition of it by Grotius.

It was, therefore, not surprising that in *Harksen v Lane* NO,¹⁹⁸ the Constitutional Court interpreted expropriation to mean a compulsory acquisition of rights in property by a public authority. Compulsory is used in the context of an involuntary takeover through the operation of law. In this case, the Court emphasised that such an acquisition must permanently deprive the owner of the right in order to qualify as expropriation implying thereby that where the interference with rights in property is transient, it would amount to a deprivation only.¹⁹⁹

Deprivation is a wider concept. It is in the context of South Africa possible for the exercise of regulatory powers i.e. deprivation to lead to an interference with all the ownership rights in privately owned property. The *FNB*²⁰⁰ case described the term quite broadly as referring to any interference with the use of private property and distinguished expropriation from deprivation by noting that the former is wider than expropriation and that the latter was a subset of the former.²⁰¹ This case has to be praised for its activism in raising the issue of deprivation on its own motion and filling up the lacuna created by the *Harksen* decision.²⁰² (Hopkins and Hofmeyr 2003: 54) have described the *FNB case* as a very significant precedent and identified the immediate result of its description of expropriation as a subset of deprivation as broadening the criteria for enquiry in a constitutional challenge to property.

The *FNB case* has been interpreted to imply that in property challenges it must first be established that all interference with property passes the test in s 25(1). This is said to have immense practical benefits for property challenges because a claimant is no longer required to make an election at the outset, whether the claim is based on expropriation or deprivation. The definition of non-arbitrariness in the same case does also have huge practical consequences for the protection of private property as well as the capacity of the dispossessed to access land.

The approach in this case though commended in certain respects has also been criticised by (Hopkins and Hofmeyr 2003: 55) who claim that the FNB adoption of the rationality test in determining arbitrariness will result in a truncated protection of property. After suggesting that the approach leaves government a free hand to act as it wishes, these authors indicated their preference for the proportionality test²⁰³ because of the latter's tendency to result in a greater protection of private property.

Their argument, however, smacks of the tendency to frustrate the restoration of dispossessed land to their African owners. The argument may be criticised because it is diversionary to stress that the rationality test favours the state's liberty to interfere with private property. Contrary to their conclusion, the test simply gives the state greater flexibility in managing the country's land reform regime to attain the goals of land redistribution which is the single most important need of post-apartheid South Africa. FNB's preference for the rationality test is in this respect consistent with the same judgement's view that the history of land dispossession should be a primary consideration in the interpretation of s 25.

Expropriation is permissible in terms of law of general application for public purpose. Although public purpose can be construed either broadly or restrictively, the *FNB case* rightly favours a broad interpretation of public purpose because of the country's land history. Admittedly, although an expropriation that is done specifically for the benefit of a private individual or State's commercial venture would be unconstitutional, this will not be the case where an expropriation not intended for the benefit of an identifiable person but the public at large, effectively benefits a private individual like in the case of land redistribution. This is an access facilitating conclusion clearly supported by s 25(4) of the constitution which requires the construction of public purpose to include the State's commitment to bring about equitable access to natural resources.

Indeed, the new s 42 E of the Restitution Act²⁰⁴ was clearly intended to broaden the meaning of public interest because it made expropriation of land for restoration to a claimant either in terms of the Act or for any

other land reform purpose come within the contemplation of public interest. By s 42 A of the same amendment, the transfer to the claimant must take place soon after the expropriation.

The government's power to expropriate land for redistribution as discussed above poses a real challenge in the new land policy. The new s 42 A of the Restitution Act, however, makes it difficult for the process to be opened to the type of abuses seen in Zimbabwe. Happily, the South African experience has escaped the pitfall of the land reform in the latter characterised by the fact that the beneficiaries appear to be close friends of the political leadership. Although the expropriation and redistribution of land have as yet not been exposed to fraudulent land transactions capable of affecting the credibility of the process, the process nevertheless suffers an inherent weakness associated with the cost of compensation for expropriated land.

Restitution

The definition of restitution of land can be best approached after a careful reading of three separate definitions in s 1 of the Restitution Act as amended, viz "right in land", "restitution of a right in land" and "the provision of equitable redress." (Mostert 2002: 406) defines the phrase as 'the restoration of a right in land or the provision of equitable redress.'²⁰⁵ The author qualifies this definition by noting that the rights in land to be restored relate to land dispossessed after 19 of June 1913 as a result of past racially discriminatory law or practices. Right in land has, according to (Merwe and Pienaar 1994: 308) been used extensively to cover ownership, the interest of a labour tenant, customary law interest and the interest of a beneficial occupier who was on the land for ten years preceding the dispossession.

The new South African government recognised that a mammoth responsibility rests on it to give effect to restitution of land rights, but this was, as observed in the (White Paper 1997: 317) to be done in such a way as to provide support to the vital process of reconciliation, reconstruction and development.²⁰⁶ This realisation of the need for reconciliation between the opposing political forces has played a crucial role in determining the basic structure of the restitution mechanism.

Section 25(7) of the 1996 Constitution grants to persons and communities dispossessed of property after 19 June 1913 as a result of racially discriminatory laws or practices rights either to the restitution of that property or to equitable redress. It will be necessary to briefly point out that there are distinctions between the provisions of the interim constitution, the Restitution Act and 25(7) of the 1996 Constitution on restitution. Section 28 of the interim constitution refers to rights in

property, s 25(7) to property while the Restitution of Land Act 22 of 1994 specifically restricted the restitution process to those dispossessed of rights in land.²⁰⁷

Eisenberg (1998: 40)²⁰⁸ has pointed out that the phrase ‘right in land’ is clearly more limited than that of right to property. He argues that the latter is broader and has extended the restitution mechanism to both owners and holders of other land rights such as customary interest in land. Although this author notes that the use of property in s 25(7) implies a narrower scope of restorable rights, he nevertheless points out that the restorable rights are still extensive because the Constitution has not prohibited the extension of the rights to restitution to holders of personal rights in land.²⁰⁹

The 1913 cut-off date for restitution

The cut-off date of 19 June 1913 is significant because it is the date that the notorious Land Act 1913 came into effect. This Act, which according to (Eisenberg 1998: 428) had a devastating impact on the rights of South African blacks to land, has influenced land policy profoundly thereafter.²¹⁰ (Miller and Pope 2000: 428) have described the limitation of restitution claims to 1913 as a critical aspect of the process, resulting from a pragmatic compromise. These authors identified the basis of this compromise as follows:

- i) Aboriginal title should not form the basis of restitutionary claims because the countries in which they have been applied are historically and demographically different from South Africa.
- ii) Aboriginal title is an inappropriate basis for land claims because (a) the ownership paradigm of ancient times is different from what it is now (b) some of the lands settled on by whites were *terra nullius*.
- iii) Fear that historical claims would create problems that would be impossible to solve as it may serve to awaken destructive tribal rivalries over land that have been possibly settled on by different ethnic groups.

B de Villiers (2003: 61)²¹¹ equally agrees with the limitation of restitution as stated above. For him ‘it may be very difficult for many black tribes or ethnic groups to demonstrate that their traditional title had not been extinguished through previous acts of government.’

While conceding that the massive demographic shift, the absence of written record and the passage of time are formidable obstacles to any restitution claims, Wyk (2004: 485) contends that this should not have led to the dismissal of the different views on the recognition of aboriginal titles. There is a consensus of opinion that aboriginal title can, on the basis of international law and common law jurisprudence and practice, be

a legitimate and working part of South African law (Bennet and Powell 1999: 449, Reilly 2000: 512).²¹²

It, in fact, seems defeatist for the government to assume that fixing the cut-off date on 19 June 1913 and thereby eliminating aboriginal title was the best way to go in the circumstances of the land history of South Africa. The historical and demographic differences in societies like Canada and Australia have not prevented South African courts from relying on precedents in these countries in support of constitutional interpretations in major decisions touching on significant areas.²¹³ Moreover, one only needs to turn to the Australian case of *Mabo v State of Queensland* (No 2)²¹⁴ to challenge the above contentions. Firstly, the *Mabo* decision recognised original titles in the Murray Islands, in spite of the close similarities between the colonial history of land in both countries. The Australian High Court, quite rightly, rejected the self-seeking false contention that the lands in Australia were *terra nullius* before 1788.

The contention that some of the land occupied by settlers in South Africa was *terra nullius* and not appropriate for restitution as canvassed, is with respect, not convincing. It seemingly reflects the tendency to device exculpatory reminiscences by those who having unjustly enriched themselves with African lands seek to frustrate its restoration. Although the passage of time may have blurred evidence of some disposessions, a functional restitution of historical claim is still perfectly possible in the country.

Klug (1996: 392) has gone a step further by demonstrating that it is perfectly possible to identify land dispossession dating back to the 1880s. He gives three examples in which lands were dispossessed through a conscious process of corruption and fraud before 1913 and which are capable of forming the basis of claims for restitution. First in 1884, the Boers recognised two settlements and 95 farms as belonging, by their own admissions, to Africans in the Thaba’Nchu area of the Barolong region of the Orange Free State. However, by 1900 only 54 of these farms remained in the hands of the Barolong landowners; the rest having been lost to whites through forfeiture as a consequence of dubious mortgages which the natives allegedly could not pay back.

Second, the white settlers in Griqua land after the annexation of 1874 owned just 63 of the approximately existing 505 farms in the area. Subsequently, these titles of the Griqua landowners passed into the hands of white merchants and speculators who insisted that debts be paid in land. This practice was so successful that the Griqua landowning community which was allied to the colonial administration became a community of landless people with a bitter grudge against their white allies.

The third and the author's²¹⁵ final example relates to lands lost to the lawyer and parliamentarian Va Fenner-Solomon. This lawyer claimed to have extended lavish loans including legal fees to the natives of the Kat River. Following the grant of titles to these natives after the Boedel Erven Act of 1905, he caused these natives to sign legal documents which made their properties expropriable by him for any default. The natives were later to lose their lands en masse to him because of so-called defaults in payment. It is obvious that if these victims were white, it would have been impossible for such fraudulent disposessions of their property to occur.

Limiting the restitution process to 1913 has clearly defeated claims to any of the above clearly identifiable disposessions. This is objectionable for two important reasons. The victims and their descendants are refused ownership of their land since ownership in the view of Joubert (2002: 218) ought to include the right to reclaim one's thing from anyone who wrongfully retains it.²¹⁶ This right is not defeated by a mere passage of time (Barry 2004: 379).²¹⁷

The restitution process is based on the Aristotelian theory of corrective justice. Clearly, whereas in the identified cases above, this could still be done, it would theoretically be unsound to foreclose it by an arbitrary limitation of time provision. This reason compels a revisit of the limitation of restitution process to 1913. There are various ways in which proof of pre-1913 disposessions may be established. Evidence from custom, oral traditions and historical records, including records of colonial officials can be used to ascertain some of these claims.

The restitution claim through the LCC to the Constitutional Court in *Alexkor Ltd & Anor v The Richtersveld Community & Anor*²¹⁸ has introduced interesting insights on this issue. Although on a claim based on the doctrine of aboriginal title, the LCC held that it did not have the powers to determine the issue of aboriginal title. It opined that the High Court could have the power to develop the common law to incorporate it. Equally interesting is the approach of the Supreme Court of Appeal (SCA) which made reference to the doctrine but thought that it did not neatly fit into South African common law. It has, however, been argued that the SCA approach to the role of custom 'and its focus on indirect discrimination, stresses the importance of the decision with regard to recognising claims for aboriginal title and its incidences' (Wyk 2004: 486).²¹⁹

The Constitutional Court deliberately used the language of aboriginal title and drew heavily from countries which have recognised the title. It held that it could competently assume jurisdiction on aboriginal title because this comes within the contemplation of issues bearing on or having a logical connection to the claim of the community.²²⁰ The Court

noted that its approach is justified because of the Court's broad jurisdiction to determine constitutional matters and the need to avoid an artificial fettering of its function when obliged to determine a constitutional matter.²²¹

Eligibility to claim restitution

Land disposessions under apartheid were profound and naturally generated a great deal of debate before the enactment of the restitution legislation. A major point of this debate centred on the definition of eligible claimants so as to ensure a just restitution process. For (Klug 1996: 398) ²²² the claimants who should be considered in the restitution process should include those affected by:

- (1) Rules dividing the land surface into race groups
- (2) Removal provisions so as to implement resettlement in terms of apartheid legislative map under s 5(1) (b) and 46(2) of the Native Administrative Act of 1927 and Group Areas Act 1966, respectively.
- (3) Other apartheid removals (e.g. under Prevention of Illegal Squatting and Trespassing Acts).
- (4) Prohibitions, which were directed at stopping persons to enter certain areas (e.g. areas under pass laws).

The author contended that of these four types, only categories (ii) and (iii) were proper bases of claims for lost land.²²³ (Christiansen 1996: 379)²²⁴ argues that it is possible to identify four broad categories of rural forced removals arising from within these two sets of categories for which restitution or restoration should apply. These are; black spot removals, homelands consolidation removals, labour tenants and squatters and betterment schemes.

Racially discriminatory laws and practices

The criteria for determining eligibility for restitution that finally emerged, is based on the Land Restitution and Reform Law Amendment Act 63 of 1997 hereinafter referred to as the Restitution Act. The Act combines the relevant provisions of the Interim Constitution and its own provisions so as to bring the restitution process in line with the provisions of the 1996 Constitution. Section 2(1) (a) of Act 63 of 1997 is almost identical with s 25(7) in substance. Entitlement to restitution in terms of the Restitution Act was based on whether the dispossession was the result of past racially discriminatory laws or practice.²²⁵

The crucial question to consider is the meaning of 'past racially discriminatory law and practices' as used in s 2(1) (a) and s 25(7) of Act 66 of 1997 and the 1996 Constitution, respectively. There is no direct

definition of the phrase in any of the legislations that make reference to the phrase,²²⁶ although s 1 of the Restitution Act attempts instead to identify racially discriminatory laws. This provision which identifies the phrase as referring to laws ‘made by a sphere of government and subordinate legislations’ since... unfortunately, did not advance the search for a definition of the phrase. It is necessary to commence this discourse with an analysis of judicial decisions and academic opinions on the issue.

The early decisions on the point sent conflicting signals regarding the direction to take between a preference for a narrow and that of a broad definition of the phrase. The Constitutional Court in *Pretoria City Council v Walker*²²⁷ held that a discriminatory enforcement of charges in one racial area when the same is not done in others amounted to a racially discriminatory practice. This decision did not, however, have a significant impact on the definition of the phrase because it did not relate directly to dispossession. A more relevant decision on this point was delivered by the Land Claim’s Court in *Minister of Land Affairs v Slamdien*.²²⁸ The court reiterated that the interpretation would require a two-staged enquiry involving a factual and legal investigation. After stating that the phrase should be construed in accordance with the ordinary rules of interpretation,²²⁹ the Court held that it covered all dispossessions resulting from laws and practices that discriminated against persons on a racial basis in respect of the occupation and ownership of land with a view to securing a racial zoning of the country.

Slamdien’s case has been criticised by (Hoq 2002: 439) for advocating a restrictive interpretation of what qualifies for a racially discriminatory law or practice in terms of the Restitution Act.²³⁰ For this author, this restrictive and access limiting interpretation for the dispossessed results from the attempt in the case to link discriminatory law and practice with the State spatial apartheid policy. This interpretational approach reflects a failure to come to terms with the Act’s intention to attempt a broader redress of the land rights abuses of the past. For (Hoq 2004: 440),²³¹ the ‘Restitution Act consciously avoided language that restricted restitution claims to apartheid land law, though this was the body of law that was understood to be the focus of restitution.’

Miller and Pope (2000: 177)²³² on their part posit that the criteria for determining qualification for restitution should be based on a broad perception of dispossession on a racially discriminatory basis. These authors take this view because the South African society was saturated with laws that directly and indirectly discriminated against persons. Such broad formulation of the criteria for accessing the restitution mechanism is commendable. The wisdom of this approach lies in the fact that many laws and expropriations, which might at first, appear innocuous did turn

out to serve or promote racist interest. Indeed some of the obnoxious racially discriminatory laws directed at forcefully removing blacks from land had comical long titles and provisions suggesting the improvement of the welfare of blacks as their objective.²³³

The opinions of these authors are well founded because the phrase is considered different and wider than that contained in s 121(2) (b) of interim constitution in two important respects. First s 25(7) was considered as including those claimants who might not be able to point to a particular racial statute under which they were dispossessed. Such persons could still succeed pursuant to s 25(7) if they could show that their forced removal was meant to promote the object of a racially discriminatory statute. The provision in s 121(2b) of the interim constitution was considered inappropriate for inclusion in a final constitution because it was infinite while the restitution mechanism as defined by the current law has a limited time schedule.²³⁴

There has been a discernible trend towards a move away from a restrictive interpretation of the phrase ‘racially discriminatory laws and practices’ in latter decisions of the Land Claims Court. In *Re Kranspoort Community*²³⁵ the LCC departed from the *Slamdien*’s decision when it stated that it might be unnecessary to adopt the two-staged inquiry followed by the latter where the facts are incontrovertible.

The removal in this case was effected under the Group Areas Act, one of the legislations that was used to build spatial apartheid. The landowner’s ingenious defence that this law was, in this case, only used as a vehicle of convenience to remove the community members who had fallen out of favour with the church leaders was rejected. The LCC indicated its preference for a broad interpretation of this phrase when it noted that the involvement of the Native Department and the use of racial language in the correspondence brought the dispossession within the meaning of the phrase. This view is consistent with the Constitutional Court’s preference for a contextual and generous interpretation of the provision of s 25 of the 1996 Constitution in the celebrated *FNB*²³⁶ case.

The decision of the Constitutional Court in *Alexkor & Ano v Richterveld & Ano*²³⁷ puts the issue of the scope of this phrase beyond doubts. The Court categorically rejected the restrictive interpretation, which the LCC followed in the *Slamdien* and *Alexkor* cases. It disagreed with the LCC’s decision, which limited racially discriminatory laws or practices to acts or laws that ‘sought specifically to achieve the (then) ideal of spatial apartheid with each racial and ethnic group being confined to its particular racial zone.’²³⁸ It was clear to the Court that the Restitution Act has a broader scope than that suggested in the *Slamdien*’s case.

The access facilitating quality of *Alexkor* lies in the Court's extension of the scope of this phrase to cover not just the purpose of legislation, but also the impact of the legislation on a people's land rights. In the specific example of *Alexkor*, the Court stated that the Precious Stones Act 44 of 1927 and its accompanying Proclamations were racially discriminatory although they had nothing to do with spatial apartheid policy. Their discrimination lay in the fact that they did not recognise indigenous people's rights over the subject land while recognising those of registered owners (who were mostly whites) over the same land. The court's compelling position was articulated thus:²³⁹

...given that indigenous law ownership is the way in which black communities have held land in South Africa since time immemorial, the inevitable impact of the Precious Stones Act's failure to recognise indigenous law ownership was racially discriminatory against black people who were indigenous law owners. The laws and practices by which the Richterveld Community was dispossessed of the subject land accordingly discriminated against the community and its members on the ground of race.

That the law contemplates this type of an extensive approach is borne out in s 1 of the Restitution Act which, as has already been observed, indicates that racially discriminatory laws include laws made by a sphere of government and subordinate legislation. The Act has not defined subordinate legislation, but (Southwood 2000: 235) argues that it includes all legislations not made by the central parliament. These pieces of legislation include statutes; proclamations, rules, town planning schemes or industrial agreements either made pursuant to statutorily vested legislative competence or delegated legislative powers.

Subordinate legislation for this purpose includes departmental circulars and notices issued to guide public officials on matters relating to the exercise of their function. These categories of 'legislation' assumed the status of subordinate legislations when they were given legal status and enforced. For (Southwood 2000: 235) section 1 is wide enough to cover all discriminatory legislations prior to 1994, no matter how minor it would appear to have been, so long as it led to the dispossession of land. The same section of the Act defines racially discriminatory practices as an act or omission direct or indirect by:

- (i) any department of state or administration in the national, provincial or local sphere of government;
- (ii) any other functionary or institution which exercised a public function in terms of any legislation.

Thus, where any act or practice directed at a racial group by any State institution or functionary in the course of its public function leads to

dispossession or deprivation of interest in land, it would qualify as a racially discriminatory practice. If the practice complained of were not discriminatory on the face of it, it would nevertheless be considered racially discriminatory where its effect resulted in a discriminatory practice against a group.

It is worth noting here that in *Ash v Department of Land Affairs*²⁴⁰ Gildenhuys, J. adopted a very high standard for the ancillary question of those wishing to claim restitution as an ascendant of a deceased person. The court's requirement of strict proof of an applicant's relationship with a deceased dispossessed is, with respect, inappropriate. Such a requirement unduly hampers the restitution process, bearing in mind the kind of witnesses that come to these courts as claimants.

It should be noted that the Ministry's objections on grounds of lack of proof of the relationship between an applicant and his supposed predecessor in title as happened in *Ash's case* may, in fact, be a pretext to shield the State from the cost of restitution. One would have expected that the court would not attach any significant weight to such objections, particularly when nobody in reality disputed the claimant's link to the deceased dispossessed. There is clearly a worrying concern that these access restricting decisions (*Ash* and *Slamdien* cases) were given by white judges. While it may be conceded that it is besides the point whether these are mere coincidences or not, these are developments that ought necessarily to make the phenomena a matter for public debate.

The restitution scheme is not designed to seek vengeance or even a complete reversal of what had happened in the past. While aiming to restore land back to their rightful previous owners, restitution has to be done in a manner that would support reconciliation, reconstruction and development.²⁴¹ Restitution presents the State with an opportunity to acknowledge and redress past wrongs.

The commission on restitution of land rights

Section 4 of Chapter 11 of the Restitution of Land Rights Act of 1994 makes provision for the establishment of the Land Claims Commission. This section defines the structure of the Commission as well as the modalities of its work. It provides the basis for the appointment of the chief and other subordinate commissioners. The responsibility for appointing land commissioners which lies with the Minister of Land Affairs is a very onerous one. Section 4(4) of the Act specifies that the appointee should be a 'fit and proper person to hold the office.' He must also have the relevant skills and knowledge to work for the commission or such legal knowledge or qualifications, as the Minister may deem

necessary. Because the Minister has the powers to hire, he also can fire any commissioner whose performance leaves a lot to be desired.

The phrase 'fit and proper person' has not been defined by the Restitution Act as amended. It must be taken to mean someone with demonstrable probity and a grasp of the dynamics of the history of land in the country. Reference to the phrase 'such legal knowledge or qualification' would appear to suggest that lawyers would have preference. Lawyers by training and professional exposure are better equipped to handle disputes arising from claims sometimes dating back to over 80 years. Their appreciation of the concept of root of title, the various species of evidence and techniques for evaluating the veracity of a witness's testimony make them ideal for working as commissioners. It is thus not surprising that a good number of the commissioners were persons with legal exposure. The South African approach in this context must be applauded.

Jurisdiction of the commission

The South African Land Commission may either function as an entity or through an individual commissioner. When acting as an entity, a quorum is formed by a simple majority of members present. The provision to sit either as an entity or as a quorum is good. It will help to ensure that disgruntled members who may boycott sittings do not frustrate the process. The provisions of section 5(3) and (4) are also to be commended because they give the chairman a casting vote in event of a tie. This will definitely prevent the process from getting bogged down in petty squabbles.²⁴²

From s 122(1) of the interim constitution and the *Farjas case*²⁴³, the Commissioner's jurisdiction was, inter alia, to:

- (i) investigate the merit of any claims;
- (ii) mediate and settle disputes arising from claims
- (iii) draw up reports on unsettled claims for submission as evidence to a court of law and to present any other relevant evidence to the court
- (iv) exercise and perform any such other powers and functions as may be provided for in the said Act.

The commission may appoint mediators to perform the functions in item (ii) above. Where this is done, the practice tends to facilitate the process as it assists parties to settle their dispute out of court. However, the early panel of mediators were criticised by Du Villiers (2003: 57) as dominated by white experts thus creating a credibility problem for the process because it was dominated by white experts. Section 11 of the 1994

Act determines the rules governing admissibility of claims in the restitution process. The claims must be lodged in the prescribed manner²⁴⁴ and should not be frivolous or vexatious.²⁴⁵ It should also not be the subject of an order under s 35 of the Act. Section 11 further makes reference to s 2(1) of the Act as a qualifying prerequisite to approach the Commissioner. Under the latter provision, a claimant must be a person or community as contemplated by s 121(2) of the interim constitution which is similar to s 25(7) of the 1996 Constitution.²⁴⁶

The Commission functions much in the same way as the sub commission on Human Rights do under the European Convention. The Land Restitution Commission basically screened the petitions received for the purpose of determining the *locus standi* of the claimant, the reasonableness of his/her case and the possibility of encouraging a successful amicable settlement between the parties. To do this, it must investigate the claims and thereafter place itself at the service of the parties with a view to securing a friendly settlement if it is possible.²⁴⁷

The commission is obliged by s 6 (1) (b) of the Act to assist claimants in completing and filling of the relevant forms relating to their claims. The Act also makes provision in s 11 (2) for the Commission to condone any irregularities relating to the claims filed. This is a well thought out power and was praised in *Ndebele Ndzunza Community v Farms Kafferskraal No 181*²⁴⁸ as helping to facilitate the restitutionary process. The court held that the Commission legitimately condoned the non-disclosure of the interest dispossessed though required by the Act. The Commission on Restitution of Land Rights is a very important organ of the restitution process and has extensive powers. It has an investigative and proactive role. In exercising these powers, the Commission may outrightly dismiss frivolous and vexatious claims.

This power of dismissal was criticised in *Farjas' case* as setting a high standard for approaching the Commission. It would seem, however, that its inclusion is correct because it stops bogus claimants from using the process to harass others. It is thus only logical that where the claimants had been paid a just and equitable compensation, the Commissioner should dismiss the complaint at the level of the Commission.²⁴⁹ The rationale is to avoid such frivolous claims from taking the Commission's and the Court's valuable time, which would otherwise be utilised in deserving cases.

The Commission advises the Minister of Land Affairs on a variety of restitution related issues, emphasising always on the need to ensure that claims with the potential of impacting on a lot of people or affecting people with pressing needs be given priority. The Commission has substantial powers to investigate the claims once received. It endeavours

to keep the subject of the claim free from interferences from past claims. The commission could subpoenaed the production of documents with the power to criminally sanction any recalcitrant person who refuses to comply with its orders.²⁵⁰

(Miller and Pope 2000: 363)²⁵¹ have noted the Commission's limited criminal powers to punish with a maximum of three months imprisonment for failure to produce a subpoenaed document but observed that this does not appear serious enough to encourage the production of documents by a determined objector. It is hoped that people will cooperate not for fear of punishment, but for the fact that all South Africans, propertied and dispossessed alike have a stake in the new South Africa based on justice, reconciliation and development. The alternative of disorganised land invasions provides the stimulus to make the present system work.

The land claims court

The Court has the jurisdiction to hear and determine a right to restitution to any right to land and issues incidental thereto. For (Roux 2000: 416) section 35 (1) of the 1997 Act is a very important jurisdictional provision because it sets out the powers of the court when making an order for restitution. It gives the Court sufficient discretion to determine what is just and equitable in the circumstances of the facts placed before it. The Court has the powers to order: for the expropriation of the land,²⁵² that the claimant be granted appropriate right in alternative State land,²⁵³ that the claimant be paid compensation,²⁵⁴ that the claimant be included in a State housing rural development scheme,²⁵⁵ or, that the claimant be granted alternative relief.²⁵⁶

Van der Merwe and Pienaar (1994: 306) state that in exercising this jurisdiction, the Court must keep the following factors in mind.²⁵⁷ These factors, which reflect the main aim of the court, are:²⁵⁸

- a) the desirability for providing restitution for dispossessed
- b) land rights or the payment of compensation therefore
- c) the desirability of remedying past human rights abuses
- d) the requirement of justice and equity
- e) the desirability of avoiding major social disruptions
- f) any existing provision relating to the land in dispute and
- g) any factor which the court may consider relevant and consistent with the object and spirit of the constitution.

It is clear from the above that the Court has very wide jurisdiction. The previous provision of s 33 of the 1994 Act, which required that the Court should consider the feasibility of restoring land claimed by an

applicant before making the order, has been repealed by s 11(1) of the 1997 Act. It is, however, safe to say that the actual restoration of land can still be limited by feasibility concerns because s 23 of the 1997 Act retains the feasibility requirement.²⁵⁹

The Court has, in spite of its wide jurisdiction, not always dealt with jurisdictional issues consistently. It started off in the early case of *Zulu and Others v Van Rensburg and Others*,²⁶⁰ with the tendency to construe jurisdictional issues liberally rather than technically. The case dealt with the question of whether the applicant's complaint that the respondent had impounded their stock was cognisable by the Court such that it could make an order requiring their stock to be released to them. It was argued that the Court ought not to assume jurisdiction because the applicant had not been evicted. The Court held that it had jurisdiction on the grounds, *inter alia*, that the seizure of stock was in the Court's view an attempt to circumscribe the applicant's use of land.

The Court curiously declined jurisdiction to develop the common law to take account of the indigenous title of the claimants in the *Alexkor* case preferring instead to suggest that such a jurisdiction would lie in the Cape High Court. Its approach in this respect has been criticised by (Hoq 2002: 427) who argues that there is probably no better body than the Land Claims Court to interpret this situation. Hoq noted that such a construction of the Court's jurisdiction was seen as an appropriate contextual interpretation of the boundaries of the right of restitution.

It became apparent from the decision of the Constitutional Court in the *Alexkor* case that the LCC has substantial incidental powers including the power to look at events or disposessions that occurred prior to the 1913 limitation date. This decision noted that the Land Claims Court has implied powers to develop the common law in matters relating to aboriginal title otherwise the area will remain static and out of step with the ongoing jurisprudential transformation in the country.²⁶¹ Indeed, after a careful review of various statutory provisions bearing on the powers of the LCC, L A Hoq²⁶² concludes that:

the wide powers set forth.... establish the intention of the legislature to grant the Land Claims Court an active role in interpreting the provisions of the Act using all necessary and available means, not precluding the development of the common law.

Since the coming into effect of the Act, the majority of the cases handled by the Land Claims Court have been those relating to automatic reviews and the application of the Land Reform (Labour Tenants) Act 1996.²⁶³ The Court has had to deal with a substantial number of cases on the Extension of Security of Tenure Act 1997 (hereinafter referred to as

the 'Tenure Act'). Although the interpretation and application of the 'Tenure Act' was not specifically ascribed to it in the jurisdictional provision in s 22, it could legitimately exercise jurisdiction with respect to this Act.

The Tenure Act in s 1(1) makes reference to the Land Claims Court and defines it as 'the court established by s 22 of the Restitution of Land Rights Act, 1994.' This seems to be an incorporation of the Court's jurisdiction by reference. Section 17 (1) of the Tenure Act explicitly enjoins a party in any dispute under the Act to institute proceedings either in the magistrate's court having jurisdiction over the land or to the Land Claims Court. Under s 19(2) of the Tenure Act, civil appeals from a magistrate's court go to the Land Claims Court. The preamble of the Restitution Act describes the objects of the Act as 'measures designed to protect or advance persons or categories of persons disadvantaged by past unfair discrimination.

The Security of Tenure Act 1997 provides solid protection for occupiers whose occupations of property in farms were made precarious by discriminating laws in the past. It is here that the impact of the court in protecting the disadvantaged is most pronounced. In *Lategan v Koopman and Others*,²⁶⁴ the Land Claims Court set out formidable defences available to an occupier threatened with eviction (which often results from the worker's loss of productive value because of age). The Court noted that the occupier/tenant could only be evicted if all of his/her entitlements have been met, including the legal determination of his employment. The tenant's major line of defence was the fact that the tenant could only be evicted if reasonable efforts have been made to secure alternative accommodation for him/her. It is settled that the occupier must be given a two-month notice and permitted to harvest his crops and remove his structures on the land before eviction.

The case of *Mlifi v Kligenberg*²⁶⁵ concerned a review by the LCC of a magistrate's eviction order against the plaintiff. The plaintiff also asked for an order that he and his family be reinstated and paid compensation for the demolition of their home. Although the Court held that the plaintiff be reinstated there was insufficient evidence to settle the question of compensation. Ordinarily where this is the case, a civil court will dismiss the claim or at best non-suit the plaintiff.

While noting that the procedure was somewhat unusual, the Court said that it was permissible for it to be actively involved in the determination of cases before it. The judge cited the Restitution of Land Rights Act as permitting it to conduct any part of its proceedings on an inquisitorial basis. The inquisitorial model of proceedings, which is a civil law approach, is different from the adversarial method, which has

traditionally been followed in South Africa.²⁶⁶ Based on this procedure, the Court instructed the plaintiff to provide a list of what it would cost to rebuild his home for consideration in a conference, which the Court would schedule to decide the issue of compensation.

The Court is required, in pursuance to s 33 (d) to be conscious of the need not to grant relief that could precipitate any social disruptions. In *Karabo and Others v Kok and Others*,²⁶⁷ the Land Claims Court declined to make an order restoring the applicants' right of residence because this would have led to a clash between the applicants and the new workers who had been put in their residence by the respondent. The Court opted, instead, to order the respondent to pay compensation of R20 a day to the applicants so that they could live in a hostel. This was interestingly an open order; hence the respondents were to continue paying it until the Court ordered otherwise.

The payment of compensation as ordered in *Kok's case* forms an important ingredient of the Court's powers. Section 33 while enjoining the Court to take account of the history of dispossession and the hardship caused, specifically requires the Court to award compensation in s 33 (eA) and (eC). But the main aim of the Restitution of Land Act, it must be stressed, is restoration of dispossessed land. The principal objective of the Act is graphically captured in s 35(1) (a) of the Act as follows:

The court may order the restoration of land, a portion of land in respect of which the claim or any other claim is made to the claimant or award any land, a portion of a right in land in full or partial settlement of the claim.

The provision continues by giving the Court the powers to order the expropriation of land to accomplish this objective wherever necessary. It has, in conclusion, to be noted that the jurisdiction of the LCC exists alongside the minister's powers to settle claims through an administrative procedure.

The power to settle uncontroversial land claims administratively has since 1998 been decentralised to the director general and the regional land claims commissioners.²⁶⁸ Although this has led to an increase in land claims settlements, it has been criticised because of its emphasis on the payment of compensation in lieu of actual land restoration. It is said that the payment of cash raises questions about the objective of the Act and whether such payments are 'really an effective way of fulfilling such objective'.²⁶⁹ There is merit in these criticisms because to most people land reform (restitution) means giving land to the landless.²⁷⁰

Introduction

Section 25 (2) provides for the expropriation of land for public purpose subject to the payment of just and equitable compensation. There was consensus across the political spectrum that expropriation of the new land owners was dictated by the forced removal of blacks from their ancestral land. Binswanger (1996: 139) noted that this was not the case with the requirement for payment of compensation which was criticized for its potential to encumber land redistribution to the previously disadvantaged, such as the country's army of homeless people.

It has been suggested that the ANC allowed the incorporation of the provision of the requirement of compensation as a matter of political expediency. The party, which was negotiating itself into power, could not do otherwise for fear of upsetting the powerful white minority government. According to Jones, the ANC, by adopting this policy, drew on historical experiences in other African countries emerging from colonial domination. Such countries tended to first adopt laws favouring the private ownership of land and the payment of compensation for expropriation but subsequently made a robust land redistribution policy their number one priority after consolidating independence.

So what has been the South African experience regarding requirements for the payment of compensation for land taken for redistribution to the landless? The idea of the payment of just and equitable compensation for land required for reform was in the land invasion case of *Joubert & Others v van Rensburg & Others*²⁷¹ and was described as an unguided missile. Although the judge in this case was criticized for harbouring an anti-land reform agenda aimed at the protection of privileges acquired under apartheid,²⁷² subsequent interpretation of the phrase has shown that he was right in his characterization of the notion as a missile.

It cannot be denied that this 'missile' struck the possibility of a genuine land restitution and redistribution scheme with devastating effect by allowing the cost of the land required for the process to spiral. There is a connection between the requirement for the payment of market value compensation and the country's capacity to deliver access to the dispossessed through the land restitution mechanism. Indeed, Cousins (2000: 2) and Lahiff (2001: 5)²⁷³ have criticized market-driven compensation as being responsible for the country's slow land delivery rate. The former describes the reforms introduced by the property clause

and its incidental legislation as 'minimalist' (Cousins 2002: 1) regarding the compensation element as part of the compromise agreed upon in negotiations prior to the 1994 elections.

Just and equitable compensation as market value compensation

Three different legislative provisions²⁷⁴ deal with the payment of compensation for the expropriation of land. Section 25 (2), read with Section 25 (3) of the 1996 Constitution makes the expropriation of property subject to the payment of compensation, the amount, the time and manner of the payment, which must be just and equitable. The phrase 'just and equitable' is, however, limited to cases where there has neither been an agreement between the parties nor a court decision on the point.²⁷⁵

What is just and equitable compensation? Unfortunately none of the three pieces of legislation under consideration, namely, the Interim Constitution, the 1996 Constitution and the Restitution of Land Rights Act amended by Act 63 of 1997, which all make reference to this phrase, defined it explicitly. It was thus left to the court to work out what the phrase should mean. This has proven to be difficult, partly because views on the definition of just and equitable compensation have been divergent and sometimes reflect a bewildering array of ideological differences.

Generally, compensation has been rendered in different formulas in various municipal and international instruments. Terms such as just, adequate, appropriate, fair and equitable have all been used to qualify compensation. Although these formulae are not actually arbitrary, Eisenburg (1993: 412) has demonstrated from an analysis of international case law and the literature that the meanings of these different formulas cannot be given with absolute certainty. Against this backdrop, it should be noted that the word 'compensation' is ordinarily not difficult to construe.

Literarily, the word, which has a strong connotation of equality between what is given and what is taken away, denotes fair proportionate recompense for what has been taken.²⁷⁶ In South Africa, the controversy has revolved around the question of whether just and equitable compensation should be determined with reference to the market value of the expropriated land or not. Schalkwyk & Zyl (1996: 310) argue that the South African land reform process should as far as possible be land-market driven:²⁷⁷ a lower than market-value compensation is a non-market-oriented approach, which in their view may be in conflict with the goals of a rapid restitution of land.

A similar argument was seemingly raised in the First Certification case²⁷⁸ where objections were made regarding the phrasing of the

compensation provision of the 1996 Constitution. It was argued that the provision was in conflict with the universally accepted fundamental rights in Constitutional Principles II. The contention was based on the view that for compensation to be just and equitable, it must be calculated on the basis of the market value of the land.

The Constitutional Court, interestingly, did not accede to these propositions. It held that there are no consistent means for formulating criteria to determine the amount of compensation. Having noted the absence of universally accepted criteria to determine compensation, the Court stressed that each state, by implication, is perfectly at liberty to determine its own criteria to ascertain what is just and equitable. This, in South Africa, will involve taking into account the fact that the peculiar socio-political question of recognizing that what is being paid for is land dispossessed by the ancestors of South Africans of European extraction.

Van der Merwe & Pienaar (1996: 336) supported the conclusions of the Constitutional Court in the First Certification case. After acknowledging that ordinarily just and equitable compensation should require market-value compensation, they however conceded that South Africa was unusual because of the additional factors that needed to be taken into consideration in ascertaining the compensation payable.

Although not stated expressly, the Constitutional Court's view reflects an inclination to grapple with the question permeating the entire scope of constitutional jurisprudence in the new South Africa. This relates to the so-called need to balance competing interests in the interpretative approach of the reform-oriented provisions of the new constitution. The case of the First National Bank²⁷⁹ set the interpretational direction when it rightly noted that the history of the massive dispossession of Africans should be a primary consideration in determining the construction of constitutional provisions on property. The approach in the FNB case is pro-access because it ensures that the limited resources of the State that are needed to acquire land for restitution are not negatively affected by the payment of exorbitant compensation.

Justification for this conclusion is to be found in the fact that at the heart of the land debate, before and after the constitutionalization of property, there was conflict over land (Budlender 1990: 300). And the main feature of this conflict has been the strong revulsion felt by millions of black South Africans for the injustices associated with their dispossession by a settler class that never had a legitimate natural claim to the land.

Classens's (1993: 424) contention that market-value-oriented compensation was inappropriate in South Africa for a variety of reasons has to be placed in this context. Such a compensation paradigm

dramatically increases the cost of land redistribution and makes it unlikely that the State will prioritize it in the face of other pressing needs like education and health care. Another weakness is its stress on an adversarial system in which the beneficiary gets the land while the expropriated landowner receives compensation. This can result in tension and have a negative impact on the critical need for reconciliation (Ibid.).

The 1993 and 1996 Constitutions both specifically identified the factors that needed to be taken into account in assessing compensation in Section 28 (3) and Section 25 (3) (a) to (e) respectively. Section 25 (3) (a) to (e) refers to the current use of the property, the extent of direct state investment in the acquisition and beneficial capital investment of the property, and the reason for expropriation. Section 25 (3) of the Constitution widens the scope by including additional factors that should be considered before determining compensation.

It is clear from careful analysis of Section 25 (3) (a) to (e) that the idea of just and equitable compensation is based on a policy that considers the broader development interests of the state. Equally compelling is the fact that improving access to the dispossessed is imperative to kick-start the personal development of dispossessed Africans. There are distinctive new features in Section 25 that show that redistribution to enhance access to land by the dispossessed should be placed above the right to compensation.

Firstly, Section 25 (3) (b) states that the way the property was dispossessed is a relevant factor when assessing compensation. If land was taken from individuals or communities and sold to new owners at ridiculously low prices, this should be taken into consideration (Van der Merwe & Pienaar 1996: 336). The case of the Mfengu dispossession in Tsitsikamma is an excellent example of such concerns. These people were brutally removed from their land in 1977 and it was sold to white farmers at a third of its original value. These farmers were given an additional 100% government bond under the Agricultural Credit Act 28 of 1966 (Claassens 1993: 424). This brings to the fore the critical issue of the legitimacy of the property rights of the present land owners and remains a profoundly vexing question with the potential to destabilize the restitution and redistribution mechanisms if not handled with prudence. Section 25 (3) (e), which expressly states that the manner of acquisition be taken into account, must be understood in the light of what has been mentioned above.

Secondly, whereas under Section 28 of the 1993 Constitution only the current use of the property was to be considered in determining just and equitable compensation, with Section 25(3) (a) and (b), both the past and current uses of the property are factors to be considered. Chaskalson

& Lewis (1996: 31-34) as well as Van der Merwe & Pienaar (1996: 337) stressed the relevance of this by observing that allowing land to lie idle for speculative purposes must have a bearing on the level of compensation. The relevance of this contention can be seen from an observation of land holdings in South Africa that reveal that huge acreages of land have been fenced off, sometimes for use as private game or recreational reserves in the face of massive landlessness.

This places substantial discretion in the hands of the State when it comes to determining whether compensation is just and equitable. It may, for instance, decide to introduce bonds as a method of compensation payment, which could be considered payment for the purpose of provision. This is arguably a positive element because it reduces immediate financial pressure on state resources and could potentially facilitate the restitution process.

The third new constitutional matter that assesses whether compensation is considered just and equitable is **the phrase in Section 25 (3) that** 'the amount of compensation and the time and manner of payment must'. It has been claimed that this means that the amount of compensation, the time and manner of payment are factors that must be considered. This is in sharp contrast to the provisions in Section 28 of the Interim Constitution that limited the factors to be taken into account regarding the amount of compensation (Van der Merwe & Pienaar 1996: 338).

In view of the historical injustices of land distribution in the past, the consideration of the history of acquisition as well as the use to which land is put are the most critical factors in the determination of just and equitable compensation. This view is correct because as Lahiff & Rugege (2002: 283) note, it results in calculating compensation in a way that will avoid 'windfalls for the landowners and make land more affordable for the purpose of land reform'. The State has, however, been reluctant to exploit this approach, preferring instead the willing seller and willing buyer option, which is based predominantly on market-related prices, with its potential for inflated compensation.

Case law on compensation: a critique

The Land Claims Court held in *Farmer Highland Residents in Re Ash v Department of Land Affairs*²⁸⁰ **that market value was only the starting point in issues of compensation for expropriation**. The court stated that the factors in Section 25 (3) could reduce or increase the actual compensation. This decision, which strengthens the courts' tendency to award above rather than below market-value compensation,²⁸¹ is

unfortunately contrary to the Constitutional Court's clear and categorical position in the First Certification case (Lahiff & Rugege 2002: 283n).

In *Ex Parte S. Duksh and R.T Dulabh*,²⁸² the court, in a preliminary application, held that 'compensation' should be given a broad and generous interpretation. It reasoned that this interpretative course was imperative because of the requirements of equity and justice. It is difficult to speculate on what broad and generous mean in the context of the ruling since the substantive issue of compensation was not decided. It is, however, likely to imply a handsome payment which technically could be higher than the land's market value. This appears compelling because the applicants in the case sought substantive compensation after they had repurchased the property themselves.

The same court curiously took an entirely different approach on the issue of compensation, which must always be read in the context of just and equitable qualification. It held in *Ex Parte Elandskloof Vereeniging*²⁸³ that it was not its role to investigate the validity of the claim or the reasonableness of the settlement. This startling preposition regrettably turns the court into an institution that just rubberstamps the Claims Commissioner's view on issues within the jurisdiction of the LCC.

In the case under review, the court acceded to compensation of R3,950,000,00 without any reference as to how this was arrived at. This huge sum cannot be right, or justified on the basis of the parties' mutual settlement. Section 25 (3) places an onerous responsibility on the court to construe compensation in a way that reflects a balance between the interests of those affected and those of the public at large. In the light of compensation costs and the limited state resources available for land reform, it is indefensible for a court to assume this type of hands-off approach under the guise of it reflecting the parties' agreement. The Land Claims Court's interpretation of just and equitable compensation is regrettably flawed for being insensitive to the impact of the cost element in slowing the delivery of land to the dispossessed.²⁸⁴

Quite apart from the Constitutional Court's directive, just and equitable compensation has, even from a comparative law perspective, not always been synonymous with full or market-value compensation. *Mbodla* (2001: 430) relying on *Grace Br. (Pty) Ltd v The Commonwealth*²⁸⁵ and *Nehingaloo (Pty) Ltd v The Commonwealth*,²⁸⁶ demonstrates that just compensation is determined with reference to fairness in view of the interests of the parties and those of the public (*Mbodla* 2001). According to him, this demands a careful consideration on a case-by-case basis.

Even from an analytical perspective, scholars do not seem to have consistent opinions on what just and equitable compensation entails either. Mostert (2002: 411) assumes that compensation paid pursuant to

the Expropriation Act 63 of 1975 qualifies as just and equitable compensation in the present dispensation. He sees just and equitable compensation as reflecting a fair *quid pro quo* payment for the land expropriated (Ibid.). For Miller & Pope (2000: 302), market value should be the point of departure in the assessment of compensation. They, however, noted that compensation could then be adjusted either upwards or downwards depending on the case. Their argument that compensation, in theory, could even be above market value was based on the approach adopted in jurisdictions like Germany, Sweden, the United Kingdom, Ireland, Australia and Japan.

Similar preference for higher-than-market-value compensation was articulated by Chaskalson & Lewis (1996: 31-32) although they also made reference to the lower-than-market-value approach. Starting from the premise that the expropriation statute will make provision for quantifying 'just and equitable' compensation, they argue that if this happened, the court would be bound to follow such an assessment if it is higher than that calculated under Section 25 (3).

This contention is rationalized on grounds that though Section 25 (3) is couched in imperative terms, as a bill of rights, it sets minimum standards. They note that the State can always extend more protection than that prescribed in a bill of rights and suggest that it may be in the public interest to pay above-market-value compensation in exceptional cases (Ibid.).²⁸⁷ They did not make any reference to the impact of a higher-than-market-value compensation preference on state resources and how this might affect the delivery of restitution to the previously dispossessed. They did not address the issue of access through the restitution process being a human right that should not be altered by the cost of compensation.

The expropriation act 1975 as the basis for assessing compensation

Badenhorst *et al.* (2001: 103)²⁸⁸ made reference to the Expropriation Act of 1975 as providing guidance for the calculation of just and equitable compensation. After noting that Section 25 (3) of the 1996 Constitution had introduced new factors in the calculation of compensation, they nevertheless opined that compensation should reflect market value, actual financial loss caused by expropriation, interest and **solatium**. In 2004 the award of damages on the basis of Section 12 of the Expropriation Act 1975 without reference to Section 25 (3) in *President of RSA v Modderklip Boedery (Pty)*²⁸⁹ shows that the courts have persisted in awarding high levels of compensation under the Expropriation Act and have thereby shifted the balance in favour of private property. Here again

one finds curious support from mostly white academics and judges for the payment of high levels of compensation in spite of the implications for the restoration of dispossessed land.

The calculation of compensation on the basis of the Expropriation Act of 1975 is, in principle, unsound because the Act is apartheid-era legislation that did not contemplate the spirit of the new property regime of post-independent South Africa. This new spirit makes the restoration of dispossessed land the major perspective of the present property dispensation in ways that could not have been foreseen by the Expropriation Act. The First Certification and the First National Bank cases reflect the character of new property law and the need to be sensitive to the injustices caused by the forced removal of Africans from their land.

This new spirit compels criticism of the High Court's definition of just and equitable compensation with reference to the Expropriation Act in *Mooikloof Estate (EdMS) BPK v Premier Guateng*.²⁹⁰ The court's view that compensation includes an additional amount to make good any financial loss caused in the process is untenable. Even assuming that compensation based on the Expropriation Act of 1975 is correct; the *Mooikloof Estate* case will still not be appropriate guidance in ascertaining just and equitable compensation. The expropriation of land for a road, on which this case is based, cannot be equated with expropriation of land for restitution or redistribution. The latter objective, with which Section 25 of the 1996 Constitution is concerned, carries more weight than the construction of a minor road to provide access for a few privileged people.²⁹¹

Another reason for criticism of this view of compensation being unsound is the fact that it blurs the distinction between compensation and the private law concept of damages. With damages, the idea is to undo the result of an unlawful act, and it requires the court to assess damages with a view to putting the victim in the position s/he would have been had the unlawful act not taken place. This has a strong moral ring to it and in practice involves awarding full damages, which traditionally includes the loss of income and profit. Compensation for expropriation is different because it takes into account the public-interest element in the use of property.

Compensation is conceptually, therefore, not meant to fully redress a wrong or repay all possible losses. It is meant to **simply** replace the object with its value (Kleyn 1996: 402). In point of fact, this distinction is of particular resonance in South Africa because of the perceived illegitimacy of the title of the majority of white landholders whose property may be required for expropriation. This view of compensation is reasonable

because of its potential to strengthen the inevitable need for post-apartheid redistribution of land and wealth.²⁹²

The idea of conditioning the assessment of compensation with the aim of redistribution is widespread. In determining the basis for the assessment of just compensation under the Fifth Amendment of the American Constitution, the American Supreme Court adopted an approach that is concerned more with the aim of redistribution and less with the issue of the relative inviolability of private property (Bauman 1992).²⁹³ This approach is, in Bauman's opinion, in conformity with prevalent post-revolutionary views and the original objectives of those who drafted the American Constitution (Ibid.: 58). He pointed out that the United States in the immediate post-revolutionary years did not have safeguards in the Constitution against the uncompensated taking of property from private persons by the government.

There is consensus among nations that compensation requires a consideration of all the relevant factors. Such an approach has increasingly led to lower-than-market-value criteria in the determination of compensation both among nations and in international law (Eisenberg 1993: 417). In *INA Corporation v Iran*,²⁹⁴ it was stated that appropriate compensation is now the correct standard and this was interpreted to mean **a discount from the market value**. The arbitrator in this case noted that there was widespread international refusal to equate appropriate compensation with full compensation. Indeed, the tendency for a society emerging from major upheavals, like Japan after the Second World War, is to pay less than market value for land expropriated for land reform purposes (Eisenberg 1993: 417).

Compensation can, in the specific context of South African land history, be loosely classified into compensation paid for expropriation and that paid in lieu of the restoration of land. The present discussion has, so far, been based on the former. It seems apt to deal with the latter too in order to achieve a balanced view of the post-apartheid property dispensation. A correct view of the restoration of the right to land is important as it throws light on the present writer's preference for a lower-than-market-value assessment of compensation.

Section 2 (2) of the Restitution Act precludes any person who received just and equitable compensation at the time of dispossession from claiming restitution under the Act. To determine whether this was received, the court is expected to comply with Section 25 (3) of the 1996 Constitution. This criterion is different from that in Section 33 of the Restitution Act, although there is some overlap. It is thought that Section 33 of the Restitution Act should be the basis for assessing compensation payable to persons who cannot have their land restored under the Act.

The Land Claims Court seemingly opted for this approach in *Hermanus v Department of Land*.²⁹⁵

The applicant claimed compensation instead of restoration for the sale of his property, which had been a place declared as a white area. He gave evidence of the traumatic psychological impact of the dispossession, including the death of his wife from mental trauma. The court rightly held that the assessment of compensation should in cases of this nature include non-financial loss such as that which the applicant and his family had been exposed to. It is worth observing that a distinction was drawn between these forms of compensation with that prescribed under Section 25 (3) of the Constitution. In stressing the need to incorporate this extra compensation, Gidenhuy J stated that this was dictated by ordinary principles of justice that include not only the value of the land but also the emotional distress of the event itself. It may, in fact, be possible that the court did not consider the generalized deeply traumatic psychological effects on blacks of the forced removals.

Although Bruce (2004: 63) has suggested that a land reform approach driven by the market is the World Bank's preferred option, the approach is criticized for being based on the idealization of the market and for not being responsive to the need to award land to those who do not possess it (Ibid.: 48). In the particular case of South Africa, the approach has meant that financial compensation for an area of just 445,248 hectares of land has cost the state a whopping R1.2 billion (excluding settlement grants). The high cost of land expropriated for restitution has meant that the restitution claims settled between 1995 and March 2004 only succeeded in restoring 17,631 hectares of land to 662,302 beneficiaries.²⁹⁶ It is obvious from these statistics that the compensation requirement has become a tool in the hands of private property owners to veto land reform.

The South African government's expropriation of the first commercial farm, after the owner rejected its purchase offer,²⁹⁷ represents a significant development and suggests a robust response to the attitude of owners of private property who want to frustrate land redistribution efforts. The government's decision to acquire the land moves the land process in the right direction. Although Agric S A has criticized **the expropriation** and predicted far-reaching and possibly negative consequences for local and foreign investment, expropriations of this type remain the best way to speed up the land redistribution process and avoid a Zimbabwean-style land crisis in South Africa.

Introuduction

The land redistribution policy received final constitutional expression in Section 25 (4) (a) and Section 25 (5) of the 1996 Constitution. Both provisions view the redistribution policy as relating to the creation of conditions that would enable citizens to gain access to land on an equitable basis. For Van der Walt (1999: 342), these provisions prioritize the implementation and promotion of an equitable, effective and successful programme of transformation and land reform.

The land redistribution programme was conceived as a very broad reform programme structured to respond to the wider and more complex land-holding imbalance dating back to colonial occupation. It recognizes that the dispossession of indigenous inhabitants in the colonial period caused deeply felt injustices and there was a strong demand for redress that could not be satisfactorily dealt with by the restitution process. However, because it was not meant to be a direct response to land dispossession, it has not been dealt with in depth in this book.

Lahiff & Rugege (2002: 292) feel that of the three aspects of post-independence land structure (restitution, redistribution and tenure reform), it is the redistribution scheme that can be perceived as better adapted to offer access to land in terms of Section 25 (5) of the Constitution. The authors drew this conclusion because redistribution places a direct obligation on the state to create reasonable conditions to improve access to land. Although the Constitution did not – and indeed could not have – indicated the precise details of what ‘reasonable’ conditions should entail, a fair idea of what they might be is derived from the Government White Paper on Land Reform. The White Paper is broadly in line with Section 25 (5) and sets out the aim, intended beneficiaries and the expected benefits of the redistribution scheme (Ibid.).

The purpose of the land redistribution programme is to provide the poor with access to land for residential and productive uses in order to improve their income and quality of life. The programme aims to assist the poor, labour tenants, farm workers, women and emergent farmers. Redistributive land reform is largely based on willing-buyer and willing-seller arrangements. The objective of facilitating access to land for the poor shows that the programme is essentially a response to incidents of colonial, apartheid and current dispossessions. The land redistribution scheme relating to labour tenants and farm workers has thus been

included in this study, which has also addressed black women's access to land for similar reasons.

Labour tenancy

The tenure reforms introduced in the new constitutional dispensation have been dealt with in terms of the classes of persons addressed by the legislative reforms. When approached from this perspective, the promulgation of the Land Reform (Labour Tenants) Act 3 of 1996 was meant to address the plight of labour tenants. The position of farm workers and others living on land not registered in their name was taken up by the Extension of Security of Tenure Act 62 of 1997 and the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 1988 (Pienaar 1998: 428).

Labour tenancy is a resilient form of land holding which in the special case of South Africa emerged after mass dispossessions of the country's indigenous peoples. Pienaar (1998: 428) defines a labour tenant as a black person who, for want of his own land, offers his/her labour (often including that of dependants too) to a white farmer in exchange for a place to live and land to plough or graze stock (Ibid.: 424). This was especially beneficial for white land owners as it permitted them to exploit the land without having to exert any labour and it even allowed some of them to live in urban areas while black workers put the land into productive use for them. Because labour tenancy was a direct consequence of land dispossession, the practice was as widespread as the dispossession that caused it.

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Section 25 (6) of the 1996 Constitution creates the right to secure tenure for persons or communities whose interest in land is 'legally insecure as a result of past racially discriminatory laws or practices'. The content of this right is determined by an act of parliament that is subject to the constitutional expectation that it will lead 'either to tenure which is legally secure or to comparable redress'.²⁹⁹ This situates the measures adopted to enhance security and upgrade the occupational interest of labour tenant and farm workers within the ambit of the broader question of dispossession.

The study, however, excludes measures in this area of property law that do not have any direct link to dispossession on the basis of racially discriminatory laws and practices occurring from 19 June 1913. There is, therefore, no reference to such matters, for example, the protection offered by the Extension of Security of Tenure Act 62 of 1997 and the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 1988 (Roux 2000: 410).³⁰⁰

Pursuant to its constitutional mandate, Parliament passed various land legislation to reform the system of land tenure. The Land Reform (Labour Tenants) Act 3 of 1996 as amended primarily protects labour tenants from arbitrary eviction. According to the White Paper on Land Reform (1997: 2), it was stated that the Act has a two-fold objective. Besides being anti-eviction, it has also made provision for the acquisition of land by existing labour tenants through the Settlement/Land Acquisition Grant scheme. Section 5, when read together with Sections 7 and 13 of the Act, strongly protects the tenant from arbitrary eviction because a tenant may only be evicted by the order of the Land Claims Court and then only in certain circumstances.³⁰¹

Although the Land Claims Court conceded in *Zwane v Mbuyane*³⁰² that it did not have automatic review jurisdiction over orders of eviction granted against labour tenants, the protection provided to them nevertheless remains commendable. Roux (2000: 419), citing *Thukela Wildlife CC v Mvelase*,³⁰³ stated that the Court has jurisdiction in terms of Section 30 (1) of the Labour Tenant Act when read together with Section 22 (1) (CC) of the Restitution Act to determine if a labour tenant's right to occupy land has been validly terminated. This right is unaffected by the fact that the tenant was not a labour tenant at the time of the proceedings. Generally, under Section 13 (IA) (b)) of the Labour Tenant Act, a magistrate should not proceed with a case of eviction when the tenant has applied for a grant of the land in terms of Section 16 (1) of the Labour Tenant Act. Once a respondent in a claim for eviction makes a prima-facie case that s/he is a labour tenant, the matter is transferred to the Land Claims Court.³⁰⁴

According to Van der Merwe *et al.* (1996: 350), Section 26 of the Labour Tenant Act under which labour tenants who meet the legislative qualifications may apply for an award of land or particular land rights and financial assistance represents an important feature of this legislation. This essentially restorative feature under Section 16 (1) (a)-(b) of the Act permits labour tenants to apply for the land they or their predecessors occupied as tenants for five years prior to the commencement of the Act if they were illegally deprived of it.

However, to qualify for both the grant and anti-eviction protection, the applicant has to establish that s/he is a labour tenant or his/her associate. Who then is a labour tenant or his associate? The courts have not been consistent in construing the provision of Section 1 (a) (b) and (c) of the Labour Tenant's Act which defines the phrase. There are two broad trends in the interpretation of a labour tenant. The first takes a restrictive view of the definition of a labour tenant while the second is comparatively liberal.

With regard to the former, the ambitious objective of the Labour Tenant's Act was capable of being frustrated by a restrictive definition of a labour tenant, thus limiting access for the previously dispossessed. A restrictive approach was followed in *Nglobo v Salimba CC, Mgcobo v Van Rensburg*³⁰⁵ where Justice Olivier held that all three paragraphs of Section 1 of the Act had to be fulfilled before a person could qualify as a labour tenant. This conjunctive approach puts a debilitating burden on applicants.³⁰⁶ By taking this view, the judge rejected the alternative and less cumbersome disjunctive approach. The justification for adopting this technical approach was, according to the judge, based on giving the words 'and' and 'or', as used in Section 1, their ordinary meaning. While acknowledging that the legislature may not have intended the result in the *Ngcobo* case, he insisted on this interpretation, contending that it was right in principle except if the results were unfair, unjust or absurd (*Du Plessis* 2002: 563).³⁰⁷

To insist on the conjunctive approach was contrary to the spirit of the Act and the country's post-independence constitutional dispensation. The Act was designed to create a tenancy regime that would eliminate tenure insecurity and the indiscriminate evictions of the past. Only a white judge sympathetic to a white constituency committed to frustrating the restoration of dispossessed land would absurdly recognize the 'sheer number of cases that have come before the courts since the Act' (*Du Plessis* 2002: 536) and yet deliberately opt for an interpretation that would defeat the purpose of the Act by shutting out potential beneficiaries. A liberal access-facilitating definition of a labour tenant is dictated by the historical sensibilities of the country and the realities of the majority of forced removals.³⁰⁸

There is, on the other hand, a more liberal definition of a labour tenant. The first case, in this tradition *Klopper v Mkhize*,³⁰⁹ was heard in 1997 and involved an application by the applicant, the owner of a farm on which the respondents lived. The applicant, who had terminated the farm services of the respondents, was seeking a court order evicting them (15 persons in all) and a declaration that they were not labour tenants as defined by Section 1 (X11). The applicant relied on the restrictive interpretation of labour tenancy in the *Mahlangu's v Zulu* cases for the contention that respondents were not labour tenants.

Doubting the soundness of the cases on which applicants' contentions were predicated, Galgut J, who interestingly is a non-white judge, rejected the idea that this case held that the three Paragraphs in Section 1 (X1) a, b and c had to be read conjunctively. On the contrary, it seemed to him that 'in *Mahlangu's* case no more was said, however, than that what must be read conjunctively are paragraphs a and b' (*Pienaar*

1998). Although the judge conceded that the Zulu case required the fulfilment of all the criteria in Paragraphs a, b and c, he held that he could not agree with the interpretation in the case (Ibid.). He based his decision on the argument that to require Paragraph (b) to be read conjunctively with Paragraphs (a) and (b) would in substantial measure stultify the Act.³¹⁰

Pienaar (1998: 320) has praised this interpretational approach pointing out that it marked a salutary departure from an approach that views labour tenancy in isolation. Meskin J defined labour tenancy in *Tselentis Mining v Madlatose* with reference to the definition of other important notions in the Act such as 'association' and 'family member'. These interpretations are consistent with the purposive approach that the Constitutional Court has always preferred.³¹¹ Although he did not make direct reference to the advantages of a purposive approach, Meskin J noted that it accorded with the intention of the legislature. This intention, in the context of the Land Reform (Labour Tenancy) Act, was to broaden the scope of the Act's powers to intervene and protect the security of tenure of a labour tenant, demanding a liberal rather than restrictive construction of those entitled to benefit from its anti-eviction protection.

It was for this reason that Meskin J insisted that the intent was not to 'make it a sine qua non of qualification as a labour tenant that as at 2nd June 1995, one's parents or grandparents had grazing and cropping rights in addition to those possessed by oneself' (Pienaar 1998: 321). This opinion is commended because to hold otherwise would clearly limit the number of persons who could benefit from the Act's protection.

The immediate implications of the *Tselentis Mining (Pty) Ltd* case were far-reaching. It meant that an 'associate'³¹² or 'family member'³¹³ defined in Section 1 (iii) and Section 1 (iv) of the Act had significant bearing on the definition of labour tenancy. For instance, the physical possession of a farm by an associate or family member on behalf of a labour tenant was sufficient to satisfy the requirement of Paragraph (a) of Section 1 (ii) of the Act. Apart from rendering actual possession and use of the farm by the labour tenant himself unnecessary, it also made it unnecessary to establish that the labour tenant's parents or grandparents had usufructory rights over the farm.³¹⁴ This is in the writer's view consistent with the Act's designs to prohibit the eviction of a wide variety of dependants of a labour tenant.

Access to land for the black south african woman

The new property model in post-apartheid South Africa assumes that the key to resolving the country's lopsided distribution of land was the undoing of the apartheid philosophy, by which access to land was rooted

in an ideology that made race the primary defining factor. However, Meena (1992: 12) points out that not much thought was given to the fact that black South African society is patriarchal and that women carry a heavier load in production and reproduction but do not enjoy equal rights in terms of access to resources such as land.

It is thus essential to evaluate the influence of customary law and post-apartheid reform legislation with a view to assessing their impact on the black woman's land accessing capacity. It is with regard to the latter that the revision of past property relations away from a white land owner and black tenants' property structure, though salutary, ignores significant gender elements in the country's property history. Restriction of black women's access to land is one such element and lies at the root of the disparity in wealth between black women and the rest of South African society.

The black woman and land

Restrictions on the black woman's capacity to access land in South Africa fall within a wider context of the tendency that regards women as unequal to men. Fredman (2001: 29) cites Aristotle's view that 'there is a principle of rule and subordination in nature at large' as being responsible for the subordination of women and slaves in society. Admittedly, the French Revolution stressed the right of man and generated a debate on those of women, but Gaidzanwa (1992: 93) noted that the right 'pertained to the men of the bourgeoisie and not their women'. This view of the right of man was extended to the colonies, including South Africa, (Ibid.: 99) and explains why in 1937 Mr McLoughlin, a European judge, regarded the patently discriminatory subjection of women to tutelage under customary law in the Bhe case as not being inconsistent with the general principles of civilization recognized in the civilized world.³¹⁵

The quality of access to land in any community inevitably revolves around the dominant features in that community's management of land. While there are admittedly significant cultural differences in land tenure across South Africa, Barry (2004: 359) rightly concludes that communal ownership is the most prevalent feature of indigenous land tenure in the country. Land is generally held by groups represented either as communities or families.

This form of land holding fitted the way of life of ancient African communities because it had built-in safeguards to ensure fairness regarding entitlements, duties and responsibilities. Succession rules under this system of land management were concerned more with ascending to the status as family or clan head than issues of access through the distribution of family or clan property.³¹⁶ Corporately held property was

invariably left in the unit to strengthen group stability and access to it was not dominated by exclusionary rules against women.

However, much of this changed with colonialism and the emergence of apartheid. The colonial regime had an ambivalent attitude towards customary law, finding it convenient at times to disregard the customary rights of the indigenous people to their ancestral land, thereby dispossessing Africans of their land in favour of newly arrived Europeans.³¹⁷ At other times, the colonialists simply adopted an official policy aimed at profoundly distorting customary law to the serious disadvantage of women and children. Under the latter approach, the customary property structure in the country, while acknowledging the common interest (of either the community or the family), was made to unduly stress the fact that this was represented in the male head of the group (Tumnde 1998: 43).³¹⁸ A classic example of this emphasis was given by the Native Appeal Court's decision in *Sijila v Musumba*³¹⁹ defining family property as:

... a joint communal possession, containing in some instances ancestral property in which the senior males of the kraal head's family and indirectly the ancestors are concerned. Hence, though the kraal head is legally owner of the estate, his ownership is burdened with ... maintenance and habitat.

The customary law of property as conceived above has a patriarchal bias because of its entronement of the male head of the household as the only true person and holder of family property. It has been condemned for its exclusionary elements that restrict black women from accessing family property by rendering them legally and socially invisible.³²⁰

The reference in the *Sijila* case to the role of ancestors as a feature of customary law property jurisprudence in traditional African societies is revealing. Bennett (1991: 12) also made reference to a similar belief in the existence of a link between the two in traditional conceptions of land but criticizes linking conceptual analysis to the metaphysical domain that 'obscures rather than clarifies' the issues involved. Although it is true that it cannot be empirically demonstrated that ancestral spirits intervene in property matters, his argument nevertheless remains superficial if limited to reasons of the obscurity of the issues involved.

Reference to ancestral roles is a common theme in customary property conception among Africans and has significant interpretational implications for the capacity of the African woman to access land. Fissey (1992: 6) highlights a comment by a Nigerian chief who saw land as belonging to 'a vast family of which many are dead, a few are living and countless members are still unborn' as an important strand of the concept.

In this view, land is seen as a collective possession for the use of the family or community unit. Family or community heads are, in the context of this interpretation, less likely to discriminate against women in the distribution of land because to do so would expose them to the wrath of the ancestors. Indeed, Mqueke (2003: 19) noted that this idea of communal property was common everywhere in Africa and traced the South African variant to an African humanistic worldview referred to as Ubuntu.

The allusion can, on the other hand, be construed as raising significant negative consequences for the capacity of African women to access land. The linkage may result in land being perceived as playing an important ritualistic role.³²¹ Seen this way, land is a medium for performing rituals to commune with ancestral spirits, a symbolism that influences the tendency to vest land in male leaders who traditionally perform such rituals and explains women's restricted access to it (Fissey 1992: 1, 2).³²² The lack of understanding of traditional laws and customs by early European settlers in South Africa, according to Mqueke (2003: 38), favoured the emergence of official customary law that is consistent with the latter's restrictive interpretation.

Official customary law took away the flexibility that should be inherent in the system, such as the elements that define access to land on the basis of need regardless of sex and status. Small J's study (1997: 46), which revealed that black women do not have the right to access land in their individual capacity as members of traditional communities regardless of their needs, should be understood in the context of official distortions masquerading as customs. The same is true of the author's findings that women who got land through marriage could be evicted in cases of intestacies if they opted for remarriage outside the husband's original family.

Restricting the black woman's capacity to access land by legislation

The denial of land rights to black women was only a part of a broad legacy of centuries of land dispossession through racially discriminatory laws that is a key feature of South African history and continues to shape the country's discourse on land holdings. The now-repealed Native Land Act No. 27 of 1913, which introduced a race-based restriction on the acquisition of land in South Africa, was more restrictive for African women in spite of its apparent gender neutrality.

Although the aim of this Act was to get Africans to work for Europeans, Barret *et al.* (1985: 59) noted that the gendered division of labour, high rural unemployment, unreliable remittances by migrant men,

coupled with the scarcity of land as a result of this legislation, left black women no other choice than to work on white farms. Black women engaged as labour tenants formed the majority of the workers on European farms because this was, for them, an important means of accessing land since a major feature of labour tenancy was the granting of land to farm on. However, unlike their male counterparts, African women's terms of contract were comparatively harsher. Marcus (1991: 26) stated that they were mostly employed part time and their tenancies could be easily terminated, a vulnerability that limited their capacity to hold land compared to their male colleagues.

A direct and more obnoxious restriction was introduced under the rules of customary law of succession created by Section 23 of the Black Administration Act No. 38 of 1927. Subsections 1 and 2 of this provision reinforced official customary law rules of succession as follows:

- 1) All movable property belonging to a black and allotted by him or accruing under black law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and custom.
- 2) All land in a tribal settlement held in traditional tenure upon quitrent conditions by a Black shall devolve upon his death upon one male person, to be determined in accordance with tables of succession to be prescribed under subsection (10).

This law was, without doubt, the culmination of colonial bias against the black woman and has been deservingly condemned for the offensive restrictions it placed on African women's rights to access land through inheritance. The Constitutional Court has described the legislative fossilization of customs in the fashion it did as contributing to a situation where 'customary law was lamentably marginalised and allowed to degenerate into a vitrified set of norms alienated from its roots in the community'.³²³ The court concluded that, by restricting widows and daughters from inheritance rights, it was imperative to protect people from distortion masquerading as customs.

Though the Matrimonial Property Act of 1988, which was conceived as a response to a less discriminatory property bias against white women in civil marriages, introduced a spirit of justice and equality into property relations in South African marriages, it deliberately left out customary marriages in which the majority of black women were engaged for reasons of racial bias (Goldberg 1994: 241). This meant that most of the black women living in the rural areas were excluded from the remedies provided by this law during apartheid.

Black women and property rights after apartheid

Section 25 of the 1996 Constitution, namely the property clause of the new dispensation, marked a welcome departure from the past by reconceptualizing access to land for the previously disadvantaged as a human right. By ordering the state to take reasonable legislative and other measures 'to foster conditions which enable citizens to gain access to land on an equitable basis',³²⁴ equity and fairness became part of the new spirit that would underpin the laws regarding access to land. The section commits the country to moving away from the past iniquities reflected in the historical inequalities in land ownership between black men and women. Its human rights content was acknowledged by Kleyn (1996: 413), who described the quality of access guaranteed under it as amounting to the realization of individual freedom and human dignity.

To what extent have black women's access to land and security from eviction been affected by the land reform policies of post-apartheid South Africa emanating from this new property dispensation? Admittedly, the non-discrimination prohibitions in Sections 9 (3) of the 1996 Constitution and 9 (1) (b) (i) of the Communal Property Association Act of 1996 may be seen as provisions that could provide solutions to the problem. Both have identical prohibitions against unfair discrimination on the basis of race, gender and sex. This may be seen as being at the heart of the Constitution and an appropriate response to the complex customary obstacles militating against black women's capacity to own land.

There is an academic comment that the Communal Property Association Act's prohibition was concerned with ensuring that black women were not discriminated against regarding land rights. After noting the desperate position of women, particularly in rural communities, and recognizing that this tended to make 'men controllers (nominally at least) of the land and rights therein', Miller & Pope (2000: 475) concluded that 'the land reform process is concerned particularly to ensure that women are not discriminated against in the reformed new structures'.

It will seem however from early post-independence decisions that the non-prohibition grounds in the above provisions were not sufficiently strong to decisively check limitations on black women's land accessing capacity, resulting from patriarchal bias supported by distorted customs. This much was shown in *Du Plessis & Others v de Klerk & Others*³²⁵ where the Constitutional Court agreed by a majority that it could develop customary law rules on incremental lines on a case-by-case basis³²⁶ but declared that the rules of customary law governing private relations were not directly subject to Chapter Three of the Interim Constitution.

This, by implication, meant that official customary law that limited land grants to male heads of household and restricted the succession rights of female members of the family would not be affected by the equality provisions in Chapter Three of the Interim Constitution. This view has been justified by reference to the philosophy that African societies are underpinned by principles of social solidarity in which the individual interests of women are submerged to the common interest represented by the male heir.³²⁷

A similar position was taken by the court in the Recertification of the Amended Constitution of RSA³²⁸ a year later in an argument by the Congress of Traditional Leaders (CONTRALESA) that an application of the Bill of Rights to customary matters was going to undermine the core of indigenous law. The court was apparently influenced by CONTRALESA's deft nationalistic presentation of patriarchy as constituting the core of indigenous law while suggesting that the Bill of Rights was a continuation of the colonial manipulation to undermine anything customary. By casting the conflict as being between a customary law regarded as inferior by colonial powers intent on promoting foreign legal ideas at a time the country was emerging from the horrors of centuries of colonialism and apartheid, the Congress successfully played on the wish not to be seen to be out of tune with the nationalistic tide of the time.³²⁹

These early decisions reflect a weakness in the Constitutional Court since they fail to recognize that the present philosophy regulating access to land revolves around dismantling rules derived from past exclusions. In the present era of transformation, fundamental rights and land reform, a balanced and context-sensitive interpretation of the unambiguous prohibitions on discrimination in Section 9 (3) of the 1996 Constitution ought to have produced different conclusions from those in the above cases. One is tempted to see an attempt by the courts in these cases to side with the ANC government's agenda that, according to Lahiff (2004: 1), was, on matters of land reform, based on the idea that land for the landless would be supplied by the market. Although this agenda did not particularly favour black women and the dispossessed in general because of their poverty, any reluctance to reform traditional practices must be attributed to the wariness of the ANC government of a political backlash led by the chiefs who had played a key role in the party's political success.

Change came in 2005 when the Constitutional Court in *Bhe v Magistrate; Khayelisa; Shibi v Sithole; SA Human Rights Com v President of the RSA*³³⁰ revolutionized the law in this province by rejecting customs that discriminate against black women's inheritance rights. The court stressed that the inheritance of property by a male heir subject to the duty

to maintain the widow can no longer be feasible because it is a product of a custom that is inherently incapable of changing in keeping with the changing lives of the people it serves. This customary practice has, in the words of Langa J, 'failed to respond creatively to new kinds of economic activity by women ... and changing values concerning gender roles in society'.³³¹

Justification for this decision was found in the fact that while past traditional societies were communitarian and structured to contribute to the general welfare, modern South African traditional society is radically different. Clearly, social conditions no longer make the living together of the widow and the heir, as was the case in the past, realistic or tolerable. The facts of the Bhe Case demonstrate that changed circumstances have made the communitarian approach to life and succession of the past unrealistic. The suit itself was a consolidated action involving Ms Shibi and Ms Bhe, both black women, whose partner and brother respectively had died intestate leaving estates to be regulated by succession under customary law under the terms of Section 23 of Act 38 of 1927. In the latter, the deceased's father made it clear that he intended to sell the deceased's immovable property to cover the funeral expenses regardless of the interests of the surviving minor daughters of the deceased. The situation was no better in the other case, where the heir, a distant male cousin, misappropriated the funds of the estate to the bitter disappointment of the deceased's mother and sister.

Although the court was at pains to declare its recognition of the status of customary law, as long as its rules are consistent with the provisions of the Constitution, drawing inspiration from the current realities as demonstrated in the facts above, it nevertheless maintained that:

The rules of succession under customary law have not been given the space to adapt and to keep pace with changing social conditions and values ... Instead they have over time become out of step with the real values and circumstances of the societies they are meant to serve and particularly the people who live in urban areas. (*Ibid.*)

Langa J was convinced that these rules of succession, which in essence restrict the black woman's land-accessing capacity, amounted to a violation of the human rights of those who are among the most vulnerable in society. The court saw itself with a duty to rid the statute books of rules rooted in the injustices of the past, and not the obliteration of customary law. It noted that the rights involved touch on the foundational values of the Constitution (*Ibid.*).

Describing the principle of primogeniture as violating ‘the right of women to human dignity as guaranteed in Section 10 of the Constitution’ and as implying ‘that women are not fit and competent to own and administer property’,³³² the court categorically declared Section 23 of the Act and its regulation to be invalid. This decision, which has safeguarded the right of the black woman to access land through inheritance on equal terms, is certain to impact positively on black woman’s capacity to own land.

The transformation from apartheid to constitutional governance in South Africa saw the country launch a legislative onslaught with reform to improve the delivery rate of land for the previously disadvantaged, a group that necessarily ought to include black women. However, it is apparent that black women were not specifically identified for priority attention by the state. The principal tenure reform legislation, such as the Land Reform (Labour Tenant) Act of 1996 and the Extension of Security of Tenure Act of 1997 (hereinafter referred to as ESTA), did not identify black women as being entitled to special protection through the upgrading of previously precarious interests or protection from eviction. This omission is deliberate and significant when contrasted with the fact that the Labour Reform (Labour Tenant) Act had special provisions protecting labour tenants from eviction on the grounds of age.³³³

While it may be contended that protection on the grounds of age also covers black women, to do so would be misleading because it ignores their peculiar difficulties as labour tenants. Marcus (1991: 26) highlighted the plight of black women on white farms when she observed that although they were in the majority, few of the women were employed full time. The author noted that even as part-time workers, women’s terms and conditions of employment, including their vulnerability to eviction, were worse than those of their male counterparts. Legislation designed to modify relations over land, which failed to take account of the peculiar difficulties of black women, as identified above would change little.

Section 6 of the Extension of Security of Tenure Act of 1997 (ESTA) is however noteworthy because it confers on each member of a household the right of residence if the owner has consented expressly or by implication to him/her being there. According to Du Plessis *et al.* (1998: 157), this is a fairly significant development because it implies that every adult female in the household has a legally protected independent right of residence on the land that a family has been permitted to occupy and cannot be evicted except under the terms in Section 8 of ESTA.³³⁴

The Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 1998 (hereinafter referred to as PIE) would appear to have addressed some of the problems that have impeded black women’s

capacity to access land and provided protection from eviction. The preamble to the PIE gives special consideration to the rights of female-headed households, amongst others. It urges the courts to take into account the special needs of categories of women who unlawfully occupy land belonging to others before issuing eviction orders against them both under common law and under the PIE. Although this provision appreciably limits black woman's previous vulnerability to arbitrary evictions, it does not require much imagination to see that this provision is in itself disquieting. The insistence that a woman has to be the head of a family is discriminatory because a man in a similar situation does not need to satisfy such a requirement.³³⁵

This provision is nevertheless striking because it is the first time that a respondent in a proceeding was a black female head of household and this was regarded as a relevant factor in determining whether an eviction order could be made against her.³³⁶ The case of *City of Cape Town & Others v Rudolf & Others*³³⁷ demonstrates the court's tendency to be more disposed to affording women greater security from arbitrary interference in their land interests if there is an explicit legislative basis for doing so. Thus in a land invasion involving 50 respondents, the Cape High Court found the hardship of the 'sixth' (a black woman heading a household of six children) a special and compelling factor and dismissed an application for her eviction.

The country's land reform programme has better prospects of success because of the emphatic decision of the Constitutional Court in *Bhe v Magistrate; Khayelisa: Shibi v Sithole; SA Human Rights Com v President of the RSA*³³⁸ disregarding the obnoxious patriarchal succession rules. This ground-breaking decision strengthens the values of equal access to land by all. The decision is applauded for rejecting the use of custom to conceal the oppressive gender relations that continue to restrict the resource-accessing capacity of the African woman.

Conclusion and recommendations

This study has examined the crucial issue of the dispossession of Africans of their ancestral land in South Africa. It has evaluated the country's post-apartheid property structure from the perspective of determining the extent to which the injustices of dispossession have been addressed. Has access to land for the dispossessed been significantly enhanced or is it a case of changes in legislation, policies and rhetoric with no corresponding impact on the lives of the majority who were excluded under the old order?

Bearing in mind Cousins (2000: 2) and Lahiff's (2001: 5)³³⁹ criticism about the country's land delivery rate being slow, the writer agrees with the former's description of the reforms introduced by the property clause and its incidental legislation as 'minimalist' (Cousins 2000: 1). The failure of the reforms to deliver access to the dispossessed reflects this minimalist character and the gap between legislation and implementation. Both have been sources of such anxiety that the Land Access Movement of South Africa (LAMOSA)³⁴⁰ has considered a Zimbabwean-like land invasion a viable option to the South African approach. It is difficult to criticize this organization's attitude because cumulative statistics of settled restitution claims from 1995 to March 2004 reveal that only 17,631 hectares of land have been restored to 662,302 beneficiaries to date.³⁴¹

Aboriginal title

An important focus of the new property structure is Section 25 of the 1996 Constitution, which permits the expropriation of property subject to compensation for 'a public purpose or in the public interest'. Public purpose or interest in this particular context refers to the nation's commitment to land reform to facilitate access to land by those dispossessed under the old order. The new property structure, according to Miller & Pope (2000: 44), has the specific mandate of resolving the balance of priority in favour of the dispossessed.

A crucial feature of the emergent land policy is the restitution scheme devised as a mechanism to facilitate access to land by the dispossessed. However because of compromises exacted during the **constitutional** negotiations, this restitution process was limited to the restoration of land dispossessed on or after June 1913. This was further circumscribed by a second time frame that limited the period for the lodging of restitution claims, although this was subsequently extended to 31 December 1998

(De Villiers 2003: 51). These limitations³⁴² have led to a property structure that has made the rapid restoration of dispossessed land difficult.

Apart from being the date that the notorious Land Act of 1913 became operational, 1913 has nothing else to commend it as the basis for limiting restitution. This limitation is an arbitrary decision that can be construed as serving the interests of those who benefited from the skewed land policy under apartheid. Such a perception creates a credibility problem for the restitution scheme and explains the frustrations expressed by LAMOSA.

The issue should no longer be whether the courts can accommodate restitution that pre-dates 19 June 1913 but instead what can be done about this provision that short-shifts the right of some descendants of the dispossessed to repossessing lands wrongfully taken from their forebears. The writer has adopted this view in spite of the decision by the Constitutional Court in the *Alexkor Ltd* case that:³⁴³

In the light of the judgement in *Du Plessis and Others v De Klerk and Anor* the drafters of the Constitution were aware of the general rule against retroactivity. They obviously applied their minds to this aspect in relation to the restoration of land and land rights, which has always been an issue of supreme importance... Had there been any desire for the provision of the 1996 Constitution to have retroactive effect beyond this date, one would have expected this to have been so enacted. It was not.

Although the Constitutional Court expressed these strong views on the apparent finality of the limitation date, the judgment is, nonetheless, significant insofar as charting the future course of restitution is concerned. In dealing with its jurisdictional scope, the court raised 'the question whether the issue concerning the existence of the community's rights in land prior to the colonization of the Cape, or the content or incidence of such rights' constitute 'constitutional matters' or not.³⁴⁴ The decision also raised the possibility of enquiring whether 'the continuous existence of such rights after the British Crown's annexation of the Cape in 1806, or after the 1847 Proclamation or the subsequent statutory and other acts thereafter' was within the court's undoubted jurisdiction to hear constitutional matters.³⁴⁵

The position of the court as expressed above is significant in two important respects. Firstly, it may be conceived as making the point for the need to take into account pre-1913 historical facts so as to put the question of whether the community had any rights over the land on 19 June 1913 in better perspective.³⁴⁶ Secondly, though couched in jurisdictional terms, it could be interpreted as raising the question about

the recognition of aboriginal land title and to that extent, the continuous relevance of the 1913 cut-off date. This author argues that the latter interpretation is more compelling.

The Court's finding that it 'likewise has jurisdiction to determine all issues relevant to the matters that are to be established under Section 2 (1) of the Act, whether anterior thereto or not'³⁴⁷ is particularly instructive. This is so when it is read alongside the further statement that 'the wide construction is consistent with the purpose of the provision' which was:³⁴⁸

.... intended to extend the jurisdiction of this court to matters that stand in a logical relationship to those matters that are primarily, or in the first instance, subject to the court's jurisdiction. This underlying purpose is to avoid fettering, arbitrarily and artificially, the exercise of the court's functioning when obliged to determine a constitutional matter.

This approach by the Constitutional Court, in positively claiming jurisdiction as above, must be interpreted as indicating something more than a mere remark devoid of implications. To suggest otherwise is to assume rather unpatronizingly that the Court, which is the highest in the country, dealt with jurisdiction as a purely academic issue. A better view in this writer's opinion is that the Court used jurisdiction in the broader sense of having the power to hear and determine the issues in an action.³⁴⁹

It seems from comments by academics on the Alexkor case that the Constitutional Court deliberately employed the language of aboriginal title in the case. For Lehmann (2004: 88), the Constitutional Court's decision in this case leaves the possibility that 'the doctrine may yet at a future date find its way into the South African legal order, should an appropriate case come before a sympathetic bench'. Although this author has criticized the doctrine as inappropriate for South Africa, he recognized that moving the restitution date back in time represents, at least for proponents of the doctrine of aboriginal title, a possible solution to the problem posed by the Restitution Act as amended.

J Van Wyk (2004: 486) was more categorical in her argument that the Constitutional Court was moving towards the recognition of aboriginal title. According to her, the Court's finding that:

.... the Rietbiversvelds community had an indigenous law communal ownership of the land and minerals at the time of annexation in 1847, which was a separate form of ownership from the common law ownership we know today, should support the view that the doctrine of aboriginal title should be recognised in South Africa ... the constitutional court decision begins to open the door to claims based on aboriginal title. (Ibid.)

These views, which in our opinion demonstrate a reflective interpretation of the Alexkor Ltd decision, could reasonably be construed as providing justification for the amendment of the provisions of Section 25 (7) of the 1996 Constitution to accommodate the restitution of pre-1913 dispossessions.

The findings of the Constitutional Court that the LCC has the jurisdiction to develop common law as it relates to native title can reasonably be construed as importing two significant implications. It may be interpreted as suggesting: (i) a green light for amending the cut-off date provision on restitution and (ii) the recognition of aboriginal title doctrine which could apply outside the Restitution Act as an extension of common law. It is argued that by holding that it has jurisdiction to hear the case because it is an issue connected to a constitutional matter, the court tacitly recognized aboriginal title and brought pre-1913 dispossessions within the restitutionary framework contemplated by Section 25 (7).

Why should the LCC and other courts have the jurisdiction to develop common law and customary law to accommodate aboriginal title when the Constitutional Court already noted that pre-1913 dispossessions were outside the scope of the Restitution Act? It has to be assumed that the Constitutional Court's finding that the LCC has the jurisdiction to develop native title was meant to draw attention to the limitations of the restitution process from a constitutional standpoint. To do otherwise would be contrary to the Court's underlying purpose to 'avoid fettering, arbitrarily and artificially, the exercise of the court's functioning when obliged to determine a constitutional matter'.³⁵⁰

In spite of differing views on the doctrine,³⁵¹ Van Wyk (2004: 485) has suggested that the doctrine can be a legitimate and workable part of South African law. Indeed, **her** description of the application of the doctrine in South Africa as reflecting a contextual interpretation of the boundaries of the right to restitution is insightful (Ibid.: 486, 149). Besides believing that the doctrine could form a basis for asserting claims to land rights lost before June 1913, Bennet & Powell (2004: 449-85) have gone a step further in identifying the conditions they think should ground a successful aboriginal land title claim.³⁵²

Although Barry (2003: 382) asserts that there are issues surrounding the Alexkor case that need more theorizing because of the progressive nature of the case, **she** acknowledges that 'the indigenous inhabitants of South Africa now have stronger legal tools with which to reclaim their ancestral lands because of the doctrine of aboriginal title introduced by the case (Ibid.: 368).³⁵³ Attempting to deny the application of aboriginal title is of grave concern because its non-application continues to tilt the

scale of justice disproportionately in favour of the dispossessor while the dispossessed continues to live in desperation.

Amendment of section 25 of the 1996 constitution

Criticism of the land reform's **inability** to deliver access, as expressed by Cousin and Lahiff, is well founded and provides good reason to call for an amendment to the property clause. Such an amendment would rectify this weakness that is a product of the government's view that rectifying past injustice through a radical restitution scheme represents a superficial understanding of the historical realities of South Africa and, for some, the restitution of dispossessed land is not the best way to proceed.³⁵⁴ This writer not only recommends this amendment but also calls for a **consequential** revision of the Restitution Act as amended to extend the time allowed to lodge restitution claims.

An amendment would be certain to convey to the public (particularly those who suffered under the old order) that the property clause (Section 25) is not an end in itself but an instrument to pursue the positive goal of creating access to land as a human right. It is from this perspective that we argue that where a particular proviso is seen to be impeding the state's ability to deliver access to land for the dispossessed, as Section 25 (7) appears to do, there is good reason to amend it.

Amendment of the Constitution to accelerate a rule-of-law-based delivery of restitution of land should not in principle be objectionable because it is both feasible and legitimate. Reference may here be made to the fact that Canada, which has a similar history of dispossession, has had to amend its Constitution to accommodate claims based on aboriginal title.³⁵⁵ This amendment is proposed in spite of the fact that the limitation of restitution to 19 June 1913 was influenced by concerns alluded to previously.

It was alleged that to extend restitution **to before** this date would create a potentially explosive situation that the government feared could precipitate violent intra and inter-tribal conflict because of past overlapping claims to land. Secondly, it was thought that it would be difficult for persons and communities to establish their claims for dispossession were it to be extended beyond the prescribed date (Miller & Pope 2000: 178).

South Africa needs to draw the right lessons from events currently taking place in Zimbabwe because its land dispossession history is intimately connected to that of South Africa.³⁵⁶ The limitations placed on restitution for dispossessed land in South Africa are the result of compromises reached with parties representing the interests of white privilege in the same way as the independent Constitution of Zimbabwe

of 1980 was circumscribed by compromises exacted in the Lancaster House Agreement. South Africa has to avoid a situation whereby a future government could be stampeded by pressure from the landless into haphazardly amending the Constitution, as Zimbabwe did in 2000 (Chitiyo 2003: 1).³⁵⁷ This warning is all the more instructive because there are indications that some South Africans are becoming increasingly impatient with the perceived slowness of the land restitution scheme and see it as the result of a deliberate policy of appeasement of present land owners.³⁵⁸

The land situation in Zimbabwe has also demonstrated that extending the land restoration process to incorporate aboriginal title need not necessarily awaken and/or prolong destructive ethnic and racial rivalries in the country (Miller & Pope 2000: 178). While it is admittedly the case that the different ethnic groups in Zimbabwe, such as the Shona, Ndebeles etc., fought over land in the past, this has not in any way resurfaced in the context of the country's policy of land restoration, which does not have a limitation period.³⁵⁹ The Zimbabwean experience shows the potential danger of allowing frustrations to build up with the perceived impediments created under the present structure of Section 25 (7) as people might be prompted to take matters into their own hands.

The Alexkor Ltd case has shown that anxiety over how to establish pre-1913 dispossession for the purpose of restitution is unfounded. Without expressly saying so, the Constitutional Court has demonstrated that it is perfectly possible to establish dispossession pre-dating 1913. The Court was able to adequately answer the question about whether the Richtersveld community had rights over land and the content of this right as at 1847 prior to the British Crown acquiring sovereignty over the land. It was pointed out that in making a determination of this nature, the adjudicating tribunal should do so with reference to indigenous law rather than common law.

The court's view that 'the undisputed evidence shows a history of prospecting in minerals by the community and conduct that is consistent only with ownership of the minerals being vested in the community'³⁶⁰ is revealing. It shows that indigenous land rights and the manner in which these were dealt with can be conveniently ascertained even when they occurred before the limitation period.³⁶¹ It also stated quite graphically the way forward.

Evidence of the land's root of title and the subsequent dispossession of the indigenous people can be derived from witnesses' testimonies and writers' accounts. In the particular case of the Richtersveld community, sources included 'a text describing the long history of copper mining in Namaqualand by the indigenous peoples'.³⁶² There is no reason why it

should not be possible to amend Section 25 (7), especially as the reasons for its enactment are untenable in the first place.

Dispossession and post-independence access facilitation measures to land for the dispossessed through legislation remain ongoing concerns. It is for this reason that this writer thinks a broader amendment of the constitutional land reform structure is appropriate. It may be recalled that the limitation of the date for restitution for dispossessed land in Section 25 (7) of the 1996 Constitution was incorporated into the Land Restitution Act of 1994. This state of affairs has created a serious challenge regarding the capacity of the organs of state responsible to effectively deal with the subject.

It is recommended that the structural fault with the cut-off date can be easily fixed if Section 25 (7) of the 1996 Constitution is amended **to omit** the limitation date as follows:

A person or community dispossessed of property as a result of past racially discriminatory laws or practices has a right either to restitution of that property or to equitable redress.³⁶³

The deliberate choice of 'a right' rather than 'entitled to' is intended to strengthen the content of the recommended provision.

The question of the controversy about the meaning of just and equitable compensation for land expropriated for restitution in particular and other land reform purposes generally have been stressed in this study. The point was made by De Villiers (2003: 56) that market-value compensation is not ideal for the country because it is too expensive and weakens the state's capacity to deliver access to the dispossessed through the restitution mechanism.³⁶⁴ The solution to this problem lies with the amendment of Section 25 (2) (b) and Section 25 (3) of the 1996 Constitution. Section 25 (2) (b) should be amended to limit compensation to aspects of development on the expropriated land such as housing and economic plants. It is not wise in the present circumstances to pay compensation for land which has on occasion been left vacant for speculative reasons.

Section 25 (3) should be amended to require market-value compensation for developments on expropriated land. These amendments are necessary because it is unjust for compensation to be seen as a source of profit for private property owners as it now seems to be the case. It will also ensure that the primary theoretical notion of compensation is to prevent expropriation resulting in a direct loss of investment on the land.

It is obvious from past cases³⁶⁵ that the courts have tended to opt for generous compensation awards. This is unhealthy because even the

market-value compensation was based on a so-called need to secure a coalition, which would insist on sufficient appropriation in the budget to carry out land reform (Binswanger 1996: 141). It is necessary for a constitutional amendment of the type proposed here to be adopted because it would ensure that simple justice would be done to a people wrongly deprived of their land. Moreover, such an amendment would bring the law into conformity with the underlying post-apartheid constitutional requirements of equity and justice rather than the expediency of political convenience and economic sustainability.

It must be stated, however, that there can be very little merit in continuing with the current restitution policy in the face of growing concerns, even within state circles, that restitution is failing to meet policy priorities based on perceived public expectations (Miller & Pope 2000: 178). Even the Land Department has, according to Thwala (2003: 1), acknowledged that its experience has brought to light legislative and institutional shortcomings in the present structure of the land restitution process. The state's response to this fundamental shortcoming, which has consistently been through ad hoc amendments directed at dealing with the immediate difficulties of perceived problems, has proved ineffective and unsatisfactory. The Land Restitution and Reform Laws Amendment Act 18 of 1999 did not, for instance, substantially improve the perceived ineffectiveness of the restitution process to deliver access to land.

In January 2003, Thwala (2003: 1) of the National Land Committee expressed concerns about the possible implications of continuing racial misdistribution of land in the country. In sounding a note of warning, he observed that these land crises 'will either be resolved through a fundamental restructuring of the government land reform programme or it will be resolved by a fundamental restructuring of the property relations by the people themselves'. This writer believes that the direction this issue takes will depend largely on whether or not the government is prepared to introduce radical reforms in the management of land.

Regrettably, the government introduced the Restitution of Land Rights Amendment Bill in Parliament in July 2003. The proposed bill sought to further amend the principal restitution legislation – the Restitution of Land Rights Act 22 of 1994. It may be recalled that this legislation had, prior to this, been amended four times, namely, Act 84 of 1995, Act 78 of 1996, Act 63 of 1997 and Act 61 of 1998. The present bill seeks an amendment to empower the Minister of Land Affairs to purchase, acquire in any other manner or expropriate land, a portion of land or right in land for the purpose of restitution or any other land reform purpose. The bill proposes to enlarge the Minister's powers of expropriation of land for restitution by removing the provisions of the

present Act, which subjects this ministerial power to control by the courts.³⁶⁶ The Act, which is yet another ad hoc attempt to deal with the structural deficiency of the restitution framework, has already provoked impassioned opposition from parties representing South Africans of European descent in Parliament.

Judicial attitudes: a critique

The legal revolution heralded by constitutionally based democratic transformation and the display of a high degree of executive mindedness by South African judges in the past have made the need for judicial soul-searching amongst some judges inevitable (Plasket 2002: 560). It is obvious that the courts have, in some instances, failed in their post-apartheid responsibility to create access to land-facilitating jurisprudence. There are two reasons for this failure, both of which could be effectively remedied by a coherent policy of judicial reorientation.

Firstly, it would appear that some judges have been unable to appreciate or accept the present land policy. This policy emphasizes a philosophical approach that essentially moves away from the predominantly positivist approach of the past that was aimed at preserving land rights acquired through the mass dispossession of land by a small minority. The decisions in *Joubert & Others v Van Rensburg & Others*,³⁶⁷ *Richterveld Community v Alexkor Ltd*³⁶⁸ and *Slamdien's cases*³⁶⁹ may be conveniently characterized as reflecting this phenomenon. Van der Walt (2002: 840) summed it up as a failure to appreciate that a balanced and context-sensitive approach is to be preferred in the present era of transformation, fundamental rights and land reform.

There is a need for judicial reorientation to deal with the need for attitudinal change by some judges who, as Plasket (2002: 560) notes, are incapable of adapting attitudinally to the present legal dispensation that stresses the facilitation of access to land for victims of the apartheid land policy. In *Mkangeli & Others v Joubert & Others*,³⁷⁰ the Supreme Court of Appeal voiced its concern about judges creating the impression through their decisions that 'they have so aligned themselves with a particular political point of view that they are not prepared to approach the interpretation of statutes dispassionately'.³⁷¹ The Court criticized **this fixation** as being responsible for the inability of some judges to discharge their judicial oath credibly, particularly with regard to land dispossession.

Although this reorientation would help the courts develop new insights into various **other aspects** of the law, its impact on the current constitutionally driven reforms to resolve the issue of dispossessed land cannot be overemphasized. It will, for instance, help in resolving the conflicting positions taken by judges on the question of just and equitable

compensation payable for land expropriated for restitution and redistribution. This is supremely important because it is a crucial element in determining the cost and speed of the land restitution process. Clearly an interpretation that is sensitive to the historical injustices associated with dispossession would avoid creating the impression that compensation should be generous or based on the market value of the land to be expropriated.³⁷²

It may be tempting to assume that the construction of just and equitable compensation should be strongly influenced by the need to encourage reconciliation. Seen from this perspective, 'just and equitable' involves the payment of handsome compensation for the present lands being expropriated for restitution and redistribution. This assumption is dangerous because rather than securing harmony in a polarized society like South Africa, the tendency among the landless is to see this approach as further tilting the scales of justice in favour of an already privileged class whose claims lack legitimacy in the eyes of many (Van der Walt 2002: 830).³⁷³ It also ignores the fact that access to land for the dispossessed has been cast as a fundamental right which in terms of Section 25 (8)³⁷⁴ should not be impeded by reference to any other law. Experience in Zimbabwe has shown that the land question was a perfect excuse for the desperate Mugabe regime to introduce discredited policies that have set the country on its alarming slide into chaos. There is a real need to avoid something similar happening in South Africa.

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¹ A publication of Human Awareness Programme (1989) *Land in South Africa*, Grantpark:1.

² Constitution of the Republic of South Africa Act 200 of 1993.

³ Constitution of the Republic of South Africa Act 108 of 1996.

⁴ See s 25(6) of the 1996 Constitution.

⁵ See s 25(5) of the Constitution.

⁶ Robertson *op cit* at 323.

⁷ The Reconstruction and Development Programme Document paragraph 2.4.1.

⁸ This is similar to what transpired in Bolivia, where the National Revolutionary Party (MNR) used the issue of access to land as a key political tool to get the support of the rural masses in the 1950s. Doner *op cit* at 132-3.

⁹ Robertson *op cit* at 323.

¹⁰ Human Rights Watch 2002 "Land Reform in the Twenty Years After Independence" <<http://www.hrw.org/reports/2002/Zimbabwe/Zimland0302-02htm>> Accessed September 2003.

¹¹ C F Fissy *Power and Privilege in the Administration of Law: Land Law Reforms and Social Differentiation in Cameroon* Leiden Africa Studies Centre (1992) 1.

¹² Indeed, land is in traditional African world-view seen as constituting one of the elements of nature hence open to all members of the community. C F Fissy *loc cit*. An African myth of creation puts man at the centre of the universe. This has been interpreted to suggest that the universe and its resources (land) were meant for man's use. See J S Mbiti *Introduction to African Religion* London Heinemann (1997) 37-8.

¹³ See T Bennett 'The Compatibility of African Customary Law and Human Rights' (1991) *Acta Juridica*: 30.

¹⁴ *Ibid*. See also C F Fissy *op cit* at 6. Fissy cites an African chief who graphically regards "land as belonging to a vast family of which many are dead, few are living, and countless members are still unborn".

¹⁵ Fissy *op cit* at 1 and 6.

¹⁶ In *Donoghue v Stevenson* (1932) SC (HL) 31, for instance, the neighbourliness principle in the New Testament was cited as the basis for the principle of product liability. Most criminal offences e.g. murder, have their basis in the Ten Commandments in the Bible. See Keeton 1955: 111. The writer is also a Christian who believes in One True God and that Jesus Christ is the only messiah between man and God.

¹⁷ 1995 (3) SA 391 (CC).

¹⁸ This system of tenure was characterised by the provision of access to land on the basis of need.

¹⁹ (2003) 12 BCLR 1301.

²⁰ Davenport, T. H. R. (1978) *South Africa A Modern History*, London: The Macmillan Press Ltd 18.

²¹ *Ibid*.

²² It was the Company policy during the latter part of the seventeenth century to encourage white settlements. Although the Company was

essentially Dutch, it attracted staff and settlers from all over central Europe. See Davenport op cit at 19.

²³ The European colonialists conquered the *San* and *Khoikhoi* of the Western Cape with comparative ease. These indigenous peoples were quickly decimated because of weaknesses in their social structures resulting from their pastoral economy. This type of economy necessitated constant nomadic movements with the inevitable absence of strong socio-political structures. Moleah op cit at 49.

²⁴ Harlow, V. T. (1963) 'The British Occupations 1795-1806', in Walker, E.A. et al *The Cambridge History of the British Empire*, Cambridge: Cambridge University Press 171.

²⁵ Harlow op cit at 176.

²⁶ Opren, J. M. (1964) *Reminiscences of life in South Africa 1846 to the present day*, Cape Town: Shruk 117.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Duly op cit at 45.

³⁰ Duly op cit at 46.

³¹ Opren op cit at 86.

³² Farms of over 5 miles square were sold for as little as 20 pounds. See Opren op cit at 86.

³³ Opren op cit at 112.

³⁴ Duly op cit at 86. There was a series of nine wars from 1778-1888 between an advancing European people and the natives in the Eastern Cape. The frontier wars as these wars were called were an attempt to conquer the natives and dispossessed them of their lands. These wars which were bloody provided white settlers the opportunity to extend their territory as far north as present day Lesotho and Zimbabwe.

³⁵ Opren op cit at 56.

³⁶ From 1913 to when the interim constitution was enacted.

³⁷ Also called The Black Land Act 1913. Repealed by Abolition of Racially Based Land Measures Act 108 1991.

³⁸ Miller and Pope op cit at 22. The Act of course had certain positive elements. It has been argued that the Act saved many black spots from being encroached upon especially in the Natal area where black spots had reached a high level of stability.

³⁹ There was, however, serious political resistance to the Act. Indeed, it has been asserted that the South African Native National Congress the precursor of the ANC was founded primarily in response to the bill stage of the Act. The hardship resulting from the Act led to the founding of African independent churches. See also Harley H and Fotheringham R

(1999) AFRA 20 Years in the Land Struggle 1997-1999, Pietermaritzburg: Association For Advancement 17-18.

⁴⁰ Bright, S. and Dewar, J. (1998) *Land Law: Themes and Perspectives*, Oxford: Oxford University Press 10.

⁴¹ (1847) Legge 312.

⁴² (1889) 14 AC 286.

⁴³ Ibid. See also Harley and Fotheringham op cit at 15.

⁴⁴ The Black Labour Act 67 of 1964 severely restricted an African's right to work.

⁴⁵ Bundy, C. (1990) 'Land, Law and Power: Forced Removal in Historical Context', in Murray, C. (ed) *No Place to Rest Forced Removal and the Law in South Africa*, Cape Town: Oxford University Press 6.

⁴⁶ Repealed. See note 12.

⁴⁷ Jaichand, V. (1997) *Restitution of Land Rights the Forced Removal Schemes: A Workbook*, Johannesburg: Res Patria 11.

⁴⁸ Ibid.

⁴⁹ See Abolition of Influx Control Act 68 1986.

⁵⁰ Section 40 of Groups Areas Act 36 of 1966.

⁵¹ See section 1 of the Groups' Areas Act 36 of 1966.

⁵² Schoombee op cit at 87.

⁵³ Schoombee op cit at 99.

⁵⁴ Ibid.

⁵⁵ Schoombee op cit at 101.

⁵⁶ The cases were reviewed in *Minister of Interior v Lockbat* (1961) (1) SA 587 (A).

⁵⁷ It has been shown that the courts were willing partners and played their own role in building apartheid. See Van der Walt, A. J. (2001) 63.

⁵⁸ The entire operation of the Group Areas Act was based on executive discretion. See Schoombee op cit at 83.

⁵⁹ 1961 (1) SA 587 (A).

⁶¹ Courts as a general rule aim at doing substantial justice. See *Visagie v State President & Others* 1989 (3) SA 859 (A) where it was held on appeal that the construction of a prohibition which infringed on the appellant's right to travel out of a magisterial district and to participate in any meeting where the government was being criticised was *ultra vires* and unfair.

⁶³ Page 602 C-E.

⁶⁴ Schoombee op cit at 97.

⁶⁵ This Act was the precursor of the 1937 Act.

⁶⁶ Human Awareness programme op cit at 3.

⁶⁷Letsoalo, E. M. (1987) *Land Reform and South Africa: A Black Perspective*, Johannesburg: Skotaville Publishers 30. The Glen Grey Act was, in the circumstances, applicable during this period both as an attempt to suppress the African's resistance to the dispossession of his land and consolidate the policies limiting his access to land.

⁶⁸ The Act was designed to transform Africans into migrant labourers. However, most recovery of land was undertaken for the failure to pay accrued rents though these rents by today's standard were nominal. See Keegan, J. J. (1975) *Land in Fingoland*, Cape Town: Unpublished LL.B Thesis University of Cape Town 70.

⁶⁹ The Act was structurally incapable of protecting titles acquired under it. Section 5 of the Act, for instance, stated that the land acquired under the Act could not be mortgaged but item v in Schedule A permitted the same land to be sold in execution of a debt. Though s 5 may be commended for seemingly desiring the protection of Native interest in land, in the final analysis it achieved little. Many Africans lost their land to white traders who offered them loans on the security of land. See Keegan op cit at 2.

⁷⁰ Proclamation 227 of 1898 had extended the Glen Grey Act of 1894 to Transkei.

⁷¹ Regulation 42 (1) (b) of 1969.

⁷² Van der Post, D. J. (1985) 'Land Law and Registration in some of the black rural areas of Southern Africa', *Acta Juridica*, 231.

⁷³ Ibid.

⁷⁴ Van der Post op cit at 219.

⁷⁵ Van der Post op cit at 224.

⁷⁶ Keegan op cit at 70.

⁷⁷ See item V of Schedule A to the Act.

⁷⁸ Gray, K. (2002) 'Land Law and Human Rights', in Tee, L. *Land Law: Issues, Debates, Policy*, Devon: William Publishing 211.

⁷⁹ Moleah op cit at 85.

⁸⁰ Ibid.

⁸¹ The basis of the protection of communal interest to land from the chief who mismanages it was not limited to a fear of ancestral spiritual sanctions, although this played an important role. Thus the claim that respect for human right was foreign to pre-colonial Africa is not correct. It is evident from the beliefs, attitudes and institutions of indigenous peoples that in the context of land, the chief's decision and actions were contingent on various factors. He had to proffer convincing justification for his actions to his subjects who had practical methods of dealing with a deviant chief.

⁸² Singer, J. (1996) (ed) 'Property and Social Relations: From Title to Entitlement', in *Property Law on the Threshold of the 21st Century*, Tilburg: MAKLU Uitgevers Antwerpen-Apeldoorn 77.

⁸³ Sachs, A. (1990) 'Towards A Bill of Rights in South Africa', *SAJHR* 6: 4.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Sachs op cit at 7.

⁸⁷ Brook, D. (1990) 'Abie Sachs on Human Rights in South Africa', *SAJHR* 6: 28.

⁸⁸ Ibid.

⁸⁹ Brooks op cit at 25. The worldwide trend from the later part of the 18th century was to introduce a bill of rights in the constitution to check the arbitrariness of absolutist regimes. The prestige of states that constitutionalised natural rights theories in a bill of rights in the international domain made the idea fashionable and irresistible. See also Van der Vyver, J. (1996) 'Property in International Human Rights Law', in Van Manen, G. E. et al *Property Law on the Threshold of the 21st Century*, Tilburg: MAKLU Uitgevers Antwerpen-Apeldoorn 462.

⁹⁰ Ibid.

⁹¹ Van der Vyver (1996) op cit at 463.

⁹² Moleah op cit at 152.

⁹³ Unreported judgment of Zimbabwean Supreme Court. Facts reported in International Bar Association Report "Report on Zimbabwe Mission 2001" http://www.Issa.org.za/news_archives_zim.asp Accessed on 6th June 2003

⁹⁴ 2001 1 SA 46 (CC).

⁹⁵ 2002 (4) SA 36 (SCA).

⁹⁶ Klug, H. (1996) 'Bedevilling agrarian reform: the impact of past, present and future legal frameworks' in Zyl, J. V. et al *Agricultural Land reform in South Africa: policies, markets and mechanisms*, 161 He identifies the others as colonisation, inheritance, purchase and allocation through a policy of redistribution of dispossessed land by the state.

⁹⁷ Klug opcit at 162

⁹⁸ Such is the case in South America.

⁹⁹ 2001 1 SA 46 (CC).

¹⁰⁰ 2003 (11) BCLR 1236 (C).

¹⁰¹ 2002 (4) SA 36 (SCA).

¹⁰² Supra.

¹⁰³ Chitiyo, T. 'Land Violence and Compensation: Reconceptualising Zimbabwe's Land and War Veteran's Debate' http://ccrweb.ccr.uct.ac.za/two/9_1/zimbabwe.html.

¹⁰⁴ Koch, E. et al (2001) 'The Fate of Land Reform in Southern Africa: The Role of the State, the Market and Civil Society' in *Whose Land? Civil Society Perspectives on Land Reform and Rural Poverty Reduction Regional Experiences From Africa, Asia and Latin America*, 154.

¹⁰⁵ See *President of RSA v Modderklip Boedery* (Pty) Ltd 2004 (6) 40.

¹⁰⁶ 2001 (1) SA

¹⁰⁷ 2004 (6) 40.

¹⁰⁸ Supra.

¹⁰⁹ Van der Vyver (1996) op cit at 468.

¹¹⁰ The non-binding Universal Declaration of Human Rights of 1948 made reference in article 17 to the right of all to own property either individually or collectively. It also proscribed arbitrary deprivation of property rights. It is instructive that the United Nations binding treaties that evolved out of this declaration (the International Covenant of Economic, Social and Cultural Rights 1966 and the International Covenant of Civil and Political Rights 1966) conspicuously omitted any reference to property rights. This omission (except for the later which made an incidental reference to a prohibition against discrimination against children on the basis of property or birth) may be said to demonstrate the international community's lukewarm attitude to land rights. Van der Vyver (1996) op cit at 486.

¹¹¹ The *Amici* in *Grootboom's* case relied on Article 11.1 of the Covenant in his arguments.

¹¹² Article 2.1 of the ICESCR which is customarily read with Article 1.2 requires individual and collective steps to be taken in the enforcement of the right to housing. It specifically expects states to take all appropriate means including particularly the adoption of legislative measures to discharge the obligations created by the covenant.

¹¹³ See the *Grootboom case*, Supra.

¹¹⁴ See paragraph 29.

¹¹⁵ 2001 (1) SA 277 (CC).

¹¹⁶ He, however, argued that this could not be done because unlike the Committee, which is ideally suited to collect and analyse facts from state parties, the court lacked the appropriate mechanism to do so. This was the basis for the decision that the responsibility to ascertain what this minimum core is should be left with the appropriate sphere of government.

¹¹⁷ *Grootboom Case* Supra at paragraph 30

¹¹⁸ Miller and Pope op cit at 528.

¹¹⁹ See chapter 5 pages 168-173 for a discussion of the impact of the Act on access.

¹²⁰ 2002 (7) BCLR 702 (CC).

¹²¹ Van der Walt, A. J. (2004) 'An overview of developments in constitutional law since the introduction of property clause in 1993' *SA Public Law* 19: 83-84.

¹²²

¹²³ Basson, D. (1994) *South African Interim Constitution Text and Notes*, Kenwyn: Juta and Co Ltd xxii.

¹²⁴ Generally, the concept of property as used both in the interim and 1996 constitutions must extend beyond a single corporeal thing. It covers "a bundle of rights that the law, at a given time, recognises as belonging to persons who own, possess or use things capable of having proprietary interest attached to them.

¹²⁵ Kroeze, I. J. (1994) 'The impact of the Bill of Rights on Property law', *SA Public Law*, 326.

¹²⁶ Lourens du Plessis, (2003) *Re Interpretation of Statutes*, Durban: Butterworths 24.

¹²⁷ Carpenter, G. (1995) 'Internal modifiers and other qualifications in bill of right: some problems of interpretation', *SA Public Law*, 10:273.

¹²⁸ There were very few serious issues touching on the provisions of s 28 which went to the courts. The courts were not called upon to pronounce on its content and scope. It would have been interesting to see how South African courts would have dealt with the construction of this provision.

¹²⁹ Ibid.

¹³⁰ The Fifth Amendment to the American Constitution is a good example of a negative guarantee of property.

¹³¹ Chaskalson, M. has cited Mr Justice Didcott's serious disapproval of the protection of property in the constitution in the following words: "What a bill of rights cannot afford to do here, I put it to you, is to protect private property with such zeal that it entrenches privilege. A major problem which any future South African government is bound to face will be the problem of poverty, of its alleviation and of the need for the country's wealth to be shared more equitably...should a bill of rights obstruct the government of the day when that direction is taken...we shall have on our hands a crisis of the first order, endangering the bill of rights itself as a whole and the survival of the constitutional government itself." Chaskalson, M. (1993) 'The Problem with Property: Thoughts on the Constitutional Protection in the United States and the Commonwealth', *SAJHR*, 9: 389.

¹³²Kleyn, D. (1996) 'The Constitutional Protection of Property: A Comparison of the German and the South Africa Approach', *SA Public Law*, 11:413.

¹³³ Ibid.

¹³⁴ Kleyn op cit at 414. See also Van der Walt (1997) op cit at 9 who seems to echo this German approach. He also refers to the Diechordung Case BverfGE 24 1968 367 noted in his book. The case dealt with legislation which transformed some private land in Hamburg into public land. It also limited the use of private land in a dyke.

¹³⁵ BverfGE 24 1968 367.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Van der Walt (1997) op cit at 15.

¹³⁹ Kleyn op cit at 411.

¹⁴⁰ S 25 (2)-(9) create a broad land reform regime for the redistribution of land in the country.

¹⁴¹ Constitution of the Republic of South Africa Act 108 of 1996.

¹⁴² Shivji op cit at 19.

¹⁴³ Van der Walt, A. J. (1997) *The Constitutional Property Clause*, Ndabeni: Juta and Co: 11.

¹⁴⁴ 2002(7) BCLR 702 (CC).

¹⁴⁵ See s 25(5) of the Constitution.

¹⁴⁶ See s 25(2), (4) and (7) of the Constitution.

¹⁴⁷ 'Evictees forced to Squeeze into Shanty Towns in South Africa', <http://www.gnn.tv/H07046>.

¹⁴⁸ This provision enjoins the courts to consider international and foreign law when interpreting the Bill of Rights.

¹⁴⁹ Marcus, G. (1994) 'Interpreting the Chapter on Fundamental Rights', *SAJHR*, 10:93.

¹⁵⁰ 1985 18 DLR (4th) 321 (SCC).

¹⁵¹ 1985 18 DLR (4th) 641 (SCC).

¹⁵² Ibid.

¹⁵³ *Hunter v Southan in Co* Supra 793 paragraph C-D.

¹⁵⁴ *First National Bank of SA v Minister of Finance* Supra at 794.

¹⁵⁵ 1995 (2) SA 642 (CC).

¹⁵⁶ 1995 (3) SA 391 (CC).

¹⁵⁷ This writer believes that the *First National Bank & Anor v Minister of Finance* Supra implies an interpretation that is generous, consistent with the purpose of the provision as well as meant to achieve such a purpose. See Scott, C. et al (2001) 'Adjudicating Constitutional Priorities in a

Transnational Context: A Comment on Soobramoney's and Grootboom's Promise', *SAJHR*, 218.

¹⁵⁸ Scott et al op cit at 221.

¹⁵⁹ Supra.

¹⁶⁰ Scott et al op cit at 221.

¹⁶¹ Constitution of the Republic of South Africa Act 108 of 1996.

¹⁶² Lahiff op cit at 280.

¹⁶³ Section 25 (1) of the 1996 Constitution contrasts with s 28(1) of the interim Constitution.

¹⁶⁴ Van der Walt (1997) op cit at 295.

¹⁶⁵ These arguments were rejected in the *First Certification Case* (Supra) as untenable.

¹⁶⁶ Van der Walt (1997) op cit at 297.

¹⁶⁷ Ibid.

¹⁶⁸ This judicial attitude was reflected in the *Grootboom* when the Constitutional Court spelt out in details the state responsibilities to homeless people.

¹⁶⁹ 1994 (1) BCLR 75 (E) 81 G-H.

¹⁷⁰ 2002 (7) BCLR 702 (CC).

¹⁷¹ Du Plessis (2002) op cit at 137. The unprecedented pronouncement in *S v Zuma* (Supra) by Kentridge, J. that it is not easy for a judge to avoid the influence of one's personal intellectual and moral preconceptions is illustrative of the role of political consciousness in the construction of the Constitution.

¹⁷² *Soobramoney v Minister of Health KwaZulu Natal* 1981 SA 765 (CC) and *Government of RSA v Grootboom and Premier Mpumalanga v Executive Committee Association of the State Aided Schools Eastern Transvaal* 1999 (2) SA 91 (CC).

¹⁷³ (Supra).

¹⁷⁴ Paragraph 64 of the FBN case.

¹⁷⁵ Roux, T. (2002) 'Property' in Cheadle et al (eds) *South African Constitutional Law: The Bill of Rights*, Durban: Butterworths 430.

¹⁷⁶ Roux (2002) op cit at 431.

¹⁷⁷ Ibid.

¹⁷⁸ According to Roux in 2002 only one property challenge reached the courts. He argues that the Supreme Court and High courts did not pay much attention to the development of profound property law jurisprudence. Roux (2002) op cit at 453.

¹⁷⁹ 1996 (12) BCLR 1573 (CC).

¹⁸⁰ The Constitutional Court had dismissed a direct application challenging certain provisions of the Restitution Act 1994 for

inconsistency with the interim Constitution with cost. The court took the view that the issues were not significant enough to warrant direct access to it. See Paragraph 46 and 47 of the case. T Roux asserts that this judgement discouraged further challenges of reform legislations. Roux (2002) op cit at 433.

¹⁸¹ Roux (2002) op cit at 434.

¹⁸² Miller, D. L. C. and Pope, A. (2000) *Land Title in South Africa*, Kenwyn: Juta & Co Ltd: 290.

¹⁸³ Van der Walt (1997) op cit at 307.

¹⁸⁴ Ibid.

¹⁸⁵ *In Re Certification of the Amended Text of the Constitution of RSA* (1997) (2) SA 97 (39). Roux argues that the massive structural inequalities that the South African government is expected to redress makes the country's situation quite different from that of countries like the United States of America. implying the unsuitability of foreign cases in the interpretation of South African property provisions. Roux, T. (1997) 'Property' in D Davis et al *Fundamental Rights in the Constitution: Commentaries and Cases*, Kenwyn: Juta and Co 249.

¹⁸⁶ Supra.

¹⁸⁷ 1995 (9) BCLR 1235 (TK).

¹⁸⁸ Miller and Pope op cit at 297.

¹⁸⁹ African National Congress (ANC) (1994) Reconstruction and Development Programme, 20.

¹⁹⁰ Ibid.

¹⁹¹ The ANC government enacted the Restitution of Land Rights Act 22 of 1994 as a response to the dispossession of lands by the previous administrations.

¹⁹² Klug, H. (1996) (ed) 'Historical claims and the right to restitution', in Van Zyl, J. et al al *Agricultural Land Reform In South Africa: Policies, Markets and Mechanisms*, Cape Town: Oxford University Press 394. It also supports this candidate's view that access through the restitution scheme raises important human rights considerations.

¹⁹³ *S v Makwanyane*, 1995 (3) SA 391 (CC), *S v Zuma* 1995 (2) SA 642 (CC).

¹⁹⁴ Binswanger op cit at 139.

¹⁹⁵ See s 25(2) (a) Constitution of the Republic of South Africa Act 108 of 1996.

¹⁹⁶ See s 25(2) (b) of the Constitution.

¹⁹⁷ Sax, J. L. (1964) 'Takings and the Police Powers', *Yale Law Review*: 93. See also the exploitation of Grotious and Huber's positions on the notion of "overriding ownership" in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2001 SA 759 (E).

¹⁹⁸ 1998 SA 360 (LC).

¹⁹⁹ The court followed the Malaysian and Zimbabwean decisions of *Government of Malaysia v Selangor Pilot Association*, 1978 AC 337 (PC) and *Hewlett v Minister of Finance*, 1982 SA 502 (ZSC) respectively. Both dealt with expropriation involving the compulsory acquisition or use of an individual's property by the state. These decisions dealt with the interpretation of s 13 and 16 of the Malaysian and Zimbabwean constitutions respectively. Both countries have expropriation provisions similar to s 25(2).

²⁰⁰ At page 766.

²⁰¹ Van der Walt, A.J. in a recent article has indicated that this distinction weighs against the development of constructive expropriation in South African property law. Van der Walt, A. J. (2004) 'An overview of developments in constitutional property law since the introduction of the property clause in 1993', *SA Public Law*, 19:77.

²⁰² Hopkins, K. and Hofmayer, K. (2003) *The New Perspective on Property*, *SALJ*, 120 48.

²⁰³ This test seeks to enquire whether the measure adopted is proportionate to the purpose sought to be achieved.

²⁰⁴ Land Restitution and Reform Law Amendment Act 63 of 1997.

²⁰⁵ Ibid.

²⁰⁶ White Paper on South African Land Reform Policy April 1997: 317.

²⁰⁷ De Waal, J. (2001) *The Bill of Rights Handbook*, Lansdown: Juta and Co Ltd: 428.

²⁰⁸ Eisenberg, A. (1998) 'Land' in Chaskalson, M. et al *Constitutional Law of South Africa*, Kewyn: Juta & Co Ltd paragraph 40-4.

²⁰⁹ Eisenberg loc cit.

²¹⁰ Ibid.

²¹¹ De Villiers, B. (2003) *Land Reform: Issues and Challenges; A comparative overview of experiences in Zimbabwe, Namibia, South Africa and Australia*, Johannesburg: Konrad-Adenauer-Stiftung 61-62. Although he accepts that native title may find fertile ground in South Africa, he believes that it can be made part of the country's law through a rule of customary international law, Roman Dutch law or as part of the English common law. The author believes none of this process has occurred.

²¹² Ibid. See also Reilly (2000) 'The Australian experience of aboriginal title: Lessons for South Africa', *SAJHR*, 9 512-534 and Bennett and Powell (1999) 'Aboriginal title in South Africa Revisited', *SAJHR* 15 449-485.

²¹³ *S v Makwanyane Supra*, *S v Zuma Supra*.

²¹⁴ (1992) 175 CLR 1.

²¹⁵ Ibid.

²¹⁶ Joubert, W. A (2002) *The Law of South Africa*, Durban: Butterworths 218. One is conscious of the fact that a major consideration in the whole process is the fact that restitution should take place without major social disruptions. It is, however, the present writer's view that owners of dispossessed land should be paid compensation in lieu of actual restitution in circumstances where actual restoration will be disruptive.

²¹⁷ Barry, M. has cited Waldron, J.'s argument that it is possible that an unjust taking of land can because of changed circumstances become legitimate at a later stage in time as relevant to the South African situation. She, however, notes that such argument ignores the sheer importance of having past wrongs rectified for the victimised. See M Barry (200) 'Now another thing must happen: Richterveld and the dilemma of land reform in post apartheid South Africa', *SAJHR* 20 379-380.

²¹⁸ *Supra*.

²¹⁹ Wyke *op cit* at 486.

²²⁰ See Paragraph 16.

²²¹ *Alexkor* case at paragraph 24 and 30.

²²² Klug *op cit* at 398-399.

²²³ *Ibid*.

²²⁴ Christiansen, J. (1996) 'Overview of land reform issues, in Van Zyl, J. et al (eds) *Agricultural Land Reform In South Africa: Policies, Markets and Mechanisms*, Cape Town: Oxford University Press 379, hereinafter referred to as Christiansen.

²²⁵ The machinery set up in s 2 of Act 63 of 1993 is distinguishable from s 25(7) on points of detail. Section 2 separated the claims of communities from natural persons and also makes provision for claimants for the estate of a deceased claimant dying in the course of the claim. The Act has made liberal provisions for claims in cases where a potential claimant dies before lodging a claim. Miller and Pope at 328.

²²⁶ The 1991 White Paper on Land was the first public document to make reference to the range of laws which should give rise to restitution. It identified dispossession resulting from racially based measures as the basis for the claim of restitution but did not define the phrase. The document instead opted for naming the acts which qualify as racially based land measures. See *Minister of Land v Slamdiem* *Supra*.

²²⁷ 1998 (2) SA 363 (CC).

²²⁸ (1999) 1 All SA 608 (LCC).

²²⁹ Roux, T. (2000) 'Constitutional Protection of Property and Land Reform', *Annual Survey*, 413.

²³⁰ Hoq, L. A. (2000) 'Land Restitution and the Doctrine of Aboriginal Title: Richtersveld Community v Alexkor Ltd and Another', *SAJHR*, 18 439-440.

²³¹ Hoq op cit at 440.

²³² Miller, D.L.C. and Pope, A. (2000) 'A South African Land Reform', *Journal of African Law*, 44 177, hereinafter referred to as Miller and Pope (No 2).

²³³ The long title to the Native Administration Act 38 of 1927 has as one its objectives the improvement of conditions of residence of natives near urban areas.

²³⁴ *Minister of Land and Ano v Slamdien and Ano* Supra at 622.

²³⁵ (2000) 2 All SA 26 (LCC).

²³⁶ Supra.

²³⁷ Supra.

²³⁸ See paragraph 97 of the case.

²³⁹ See paragraph 96 of the case.

²⁴⁰ (2002) 2 All SA 26 (LCC).

²⁴¹ Government White Paper on land April 1997.

²⁴² The same thing may not be said of the provision in s 5 which limits the Commission to sit for three times in a year. Given the enormity of the land issue, this parsimonious sitting formula is irrational and insensitive to the acute problems the homeless are faced with.

²⁴³ *Farjas (Pty) Ltd v Land Claims Commissioner Kwa Zulu Natal*, (1998) (2) SA 900 (LCC).

²⁴⁴ 11(1) (a) There are standard forms for filling restitution claims. Claims filled in the Commission of Land Allocation established in terms of s 89 of the Abolition of Racially Based Land Measures Act 108 of 1991 are deemed to have been filled in the Commission of the Restitution of Land rights See Van der Merwe and Pienaar (1994) op cit at 306.

²⁴⁵ See s 11(1) c of the Land Restitution Act 1994.

²⁴⁶ "Person" and "community" have been defined liberally by the penultimate provision of s 2 (b) of the Land Restitution Act of 1994.

²⁴⁷ Bowett, D.W. (1982) *The Law of International Institutions*, London: Stevens and Sons 291.

²⁴⁸ 2003 (5) SA 375 (LCC).

²⁴⁹ *Farjas (Pty) Ltd v Regional Claims Commissioner Kwa Zulu Natal*. Supra.

²⁵⁰ Klug op cit at 402. Contrast this with the very limited powers of the Advisory Commission on Land Allocation under Chapter 5 of the Abolition of Racially Based Land Measure Act. The present Commission's powers are acceptable because it makes the restitution process faster.

²⁵¹ Miller and Pope op cit at 363.

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- ²⁵² See s 35 (1) (a) of the Restitution and Reform Amendment Act 63 of 1997 hereinafter referred to as the Act.
- ²⁵³ See s 35 (1) (b) of the Act.
- ²⁵⁴ See s 35 (1) (c) of the Act.
- ²⁵⁵ See s 35 (1) (d) of the Act.
- ²⁵⁶ See s 35 (1) (e) of the Act.
- ²⁵⁷ Van der Merwe & Pienaar (1994) op cit at 306.
- ²⁵⁸ Ibid. See also s 38 of the Act.
- ²⁵⁹ Roux (2000) loc cit.
- ²⁶⁰ 1996 (4) SA 1236 (LCC).
- ²⁶¹ Hoq op cit at 427.
- ²⁶² Ibid.
- ²⁶³ *Hlatshwayo and Ano v Hein* (1998) (1) BCLR 123 (LCC).
- ²⁶⁴ 1998 (3) SA 457 (LCC).
- ²⁶⁵ 1999 (2) SA 647 (LCC).
- ²⁶⁶ It had been said that such an adjectival system is hardly suited to achieving that degree of understanding essential to reconciling deep historical divisions between indigenous and settler communities over land. See Butt, P. (1996) 'The Mabo Case and its aftermath: Indigenous Land title in Australia', in Van Mannen, G.E et al (eds) *Property Law on the Threshold of the 21st Century*, Tilburg: MAKLU Uitgevers Antwerpen-Apeldoorn 504, hereinafter referred to as Butt.
- ²⁶⁷ 1998 (4) SA 1014 (LCC).
- ²⁶⁸ De Villiers op cit at 59.
- ²⁶⁹ Ibid.
- ²⁷⁰ Brown, M. (1971) 'Private Efforts at Reforms', in Doner, P. (ed) *Land Reform in America: Issues and Cases*, Madison: University of Wisconsin 243, hereinafter referred to as Brown.
- ²⁷¹ 2001 (1) SA 753 (W). See also van der Walt (2002: 817).
- ²⁷² See *Mkangeli & Others v Joubert & Others* (2002) (4) SA SCA where the Supreme Court of Appeal criticized the judge for an attitudinal fixation on the past and insensitivity to the need to construe the country's land legislation in context.
- ²⁷³ Lahiff also states that land redistribution has moved at a slow pace and attributes this to the preservation of a land structure driven by market forces.
- ²⁷⁴ See Section 28 and Section 25 of the Interim and Final Constitutions respectively that make provisions for agreement on compensation payable. When this happens, the matter is resolved and there is thus no need for a detailed analysis of the subject.
- ²⁷⁵ If there is a competent court decision on compensation, the matter should also be considered resolved, subject to both parties' right of appeal.
- ²⁷⁶ *Minister of Land v Slamdien* (Supra).

²⁷⁷ The authors did, however, take into account the peculiar land history of South Africa that covers centuries of the forced removal of blacks from their ancestral land by the current owners' ancestors.

²⁷⁸ (1997) 2 SA 97 (CC).

²⁷⁹ *Supra*.

²⁸⁰ 2000 (2) All SA 26 (LCC).

²⁸¹ See also Farmerfield Community Property Trust In re1999 (1) SA 936 (LCC). Contrast with *Khumoho & Others v Potgieter and Others* 2000 (2) All SA 406 (LCC) where the Land Claims Court revised agreed value compensation downward because of the history of the land's acquisition.

²⁸² (1997) (4) SA 1108 (LCC).

²⁸³ (1999) (1) SA 176 (LCC).

²⁸⁴ Such an interpretation will mean that poor urban and rural non-whites, most of whom are victims of apartheid land policies, may technically be required to support the payment of compensation by contributing through direct or indirect taxation. This is definitely unjust.

²⁸⁵ (1946) 72 CLR 269.

²⁸⁶ (1948) 75 CLR 495.

²⁸⁷ However, they feel that compensation should depend on the benefit that accrues to the state and what is essential is not the loss to the owner. See Paragraph 31-24.

²⁸⁸ A similar preference for higher-than-market-value compensation was suggested by Chaskalson *et al.* (1998) who argue that Section 25 (3), which requires a more context-sensitive assessment of compensation, only sets minimum standards. See also Chaskalson (1993: 9).

²⁸⁹ 2004 (6) 40.

²⁹⁰ 2000 (3) SA 463 (T). In an earlier decision in *Ex Parte Elandskloof Vereniging* *Supra* the Court took an expansive view of just and equitable compensation. In the former, it was held that it was not the court's role to investigate the fairness of compensation while in the latter it was stated that compensation was to be according to market value on a specific date. These cases may, however, be understood in the context in which they were given. The Court was at this early stage still coming to terms with the enormity of the post-apartheid property changes.

²⁹¹ The High Courts have a pro-compensation view and tend to insist on awarding compensation at the slightest interference with land rights. They are inclined to award compensation when public servitude is acquired even if legislation is not categorical on this point. See *Cheadle et al.* (2002: 435).

²⁹² Compensation for victims of dispossession in lieu of the restoration of the actual land may be based on the market-value criteria. This is justified because of the legitimacy factor in the titles of the natives who are the undisputed owners of lands in the country from time immemorial. The writer is of the view that it would be both unjust and inequitable to treat this group of claimants in the same way as white landowners who simply took what did not, in truth, belong to them.

²⁹³ Contrast with cases indicating a heightened protection of property necessitating the payment of compensation, e.g. *Keystone Bituminous Coal Association v De Benedictus* 107 SCT 1232 (1987). See also the view that compensation in the US entitles the **expropriated** to the payment of prompt, adequate and effective

compensation. This is interpreted to mean the full value of the property. See Eisenberg (1993: 415).

²⁹⁴ 8 Iran-USCTR 373 (1965). See also Eisenberg (1993: 413).

²⁹⁵ (2000) 4 ALL SA 499 (LCC).

²⁹⁶ Database of the Land Restitution Commission.

²⁹⁷ 'South Africa announces first farm expropriation' <http://www.eprop.co.za/news/article.aspx?idArticle=6286>. The insistence of Hannes Visser (the present owner of the land) on a price of R.75 million for land which was purchased in 1968 in dubious forced sale transactions can be construed as intended to simply frustrate its restitution.

²⁹⁸ Labour tenancy, though classified as a form of African tenure in white South Africa, is not natural to Africans in the sense that it does not have its roots in traditional customary practice. Blacks accepted it because they had nowhere else to go after their forced removal from their land. It was through it that they kept hope alive since it allowed them to maintain continued links with their ancestral lands. Although initially beneficial to European farmers, it was subsequently to come under strident attacks by successive apartheid regimes. It however managed to survive until the democratic transformation resulting in the enactment of the Interim and 1996 constitutions. See Budlender & Lasky (1990: 170).

²⁹⁹ See Section 25 (6) of the Constitution.

³⁰⁰ The scope of the application of these Acts is sufficiently expansive to cover a wide range of people with insecure residence rights on land. Roux makes the point that ESTA extends protection to common law leases that also satisfy the definition of occupier in s 1(1) of the Act. The PIE is seemingly enacted to deal with land invaders who appear to have become emboldened since after the democratic transformation. See Roux (2000) op cit at 410.

³⁰¹ Such an order of eviction must abide by the terms of the Act.

³⁰² 2000 (3) SA 1006 (LCC).

³⁰³ 2000 (4) SA 231 (LCC).

³⁰⁴ Joseph Bayenes Board of Administration v Dlamani (2000) (4) SA 324 (LCC). See also Roux (2000).

³⁰⁵ (1999) 8 BCLR 855 (SCA).

³⁰⁶ It is often easy to prove that the person lives or has a right to live on the farm (Paragraph a) and that s/he works for the owner of the farm in return for grazing or cropping rights (Paragraph b). The third requirement has consistently proved more problematic. This is because Paragraph c requires proof that the applicant's parents or grandparents lived on the farm and had cropping or grazing rights.

³⁰⁷ This alternative approach lessens the burden of proof on an applicant because it limits the definition of a labour tenant to the proof of either Paragraphs (a) and (b) or (a) and (c).

³⁰⁸ Van der Walt (2002) has criticized judges who fail to show sufficient sensitivity to the history of the country when dealing with anti-eviction legislation enacted to address the effects of past land policies. He has condemned the restrictive interpretation of anti-eviction legislation by judges because it seems to create the impression these judges have so aligned themselves with the point of view of the past that there are not prepared to approach the interpretation of this reform legislation dispassionately and with an open mind. See Van der Walt (2002: 837-39). It is to be regretted that in eviction proceedings, the cost of litigation becomes

expensive when the farm owner claims that the applicant is a farm worker. In such a case, although the general burden is on the farmer to establish the claim, the applicant does have the evidential burden of calling technical evidence to defeat the claim. In *Mahlangu v De Jager* 1996 (3) SA 235 (LCC), such evidence required the applicant to call a registered valuer to counter the evidence of the farm owner on the question of the comparison between remuneration and the value to be attached to the right of occupation and use of land. The Court in this case held that the applicant was not a farm worker. By doing so, less attention was paid to the technical evidence, with the preference being given to such sensitive issues as the fact that the applicant had lived on the farm all his life, as had three generations of his family.

³⁰⁹ 1998 (1) SA 406 (N).

³¹⁰ The issues and legal submissions in the second case, *Tselentis Mining (Pty) Ltd and Anor v Madlalose and Others* were similar to those in the first. The case involved the issue of the determination of the status of the respondents who were living on the applicant's farm. The question revolved around whether Paragraphs (a), (b) and (c) of the definition of a labour tenant were to be read conjunctively or as stated in *Klopper's* case. *Meskin J* discarded the approach in the *Zulu* and *Mahlangu* cases describing them as incorrect.

³¹¹ See *Harksen v Lane* NO 1998 (1) SA 300 (CC).

³¹² An associate is a family member of the labour tenant and can include anyone nominated under Section 3 (4) as the tenant's successor or under Section 4 (1) to provide labour on behalf of the tenant *Pienaar* (1998: 320).

³¹³ This can mean any member of the tenant's family. Family here is construed in the extensive sense of the idea conveyed in the traditional African context.

³¹⁴ By adopting a holistic view of the Act, it was shown that only two elements were essential for the definition of labour tenancy. These elements are (i) use and occupation of land and (ii) use of owner's land for family in exchange for the tenant's labour. See *Tselentis Mining (Pty) Ltd and Anor v Madlalose* *Supra*.

³¹⁵ *Bhe v Magistrate Khayelisa: Shibi v Sithole: SA Human Rights Com v President of the RSA* 2005 (1) BCLR 1 (CC)

³¹⁶ *Bhe v Magistrate Khayelisa: Shibi v Sithole: SA Human Rights Com v President of the RSA* 2005 (1) BCLR 1 (CC).

³¹⁷ The exclusive ownership of land by the *Richtersveld* community under customary law was lost when Section 29 of the *Precious Stones Act* 1927, which conveniently ignored the indigenous people's customary rights over the lands for centuries.

³¹⁸ *Tumde* (1998: 43) argued that the pre-colonial African woman in Cameroon had better access to land and political influence, attributing the restriction to access natural resources to the result of 'the arrival of European and foreign influences'.

³¹⁹ 1940 NAC (C&O) 42.

³²⁰ *Bhe v Magistrate Khayelisa: Shibi v Sithole: SA Human Rights Com v President of the RSA* 2005 (1) BCLR 1 (CC) at 17.

³²¹ This kind of thinking shapes the African worldview and is therefore part and parcel of a positive morality that influences the way rules are conceived.

³²² It is also behind the general belief that to allow women unrestricted access to land threatens the very existence of the community or family. This belief is

rationalized on the grounds that women who acquire rights over land may take these rights to their new family on marriage.

³²³ Bhe's Case at 17.

³²⁴ Section 25 (5) of the 1996 Constitution.

³²⁵ 1996 3 SA 850 (CC).

³²⁶ Frank Michelman has criticized a case-by-case approach to Constitutional interpretation because of its tendency of favour the status quo. He would prefer a dynamic public law ethos animated by a spirit of social change and transformation, one which in the writer's opinion would have made it impossible for the Constitutional Court to decide as it did. See Van der Walt (1997: 11).

³²⁷ Bhe's case supra at 27.

³²⁸ (1997) (2) SA 97.

³²⁹ The Constitutional Court thus set the stage that was followed by the High Court in *Mthembu v Letsela & Anor*, 1997 2 SA 936 (T) when **the court** refused to develop the customary rule of succession that excludes women from participating in the inheritance of property on the death of their parents or spouse on the grounds that women are to be maintained by the male heirs. These decisions, quite apart from clearly violating the Constitution, ignore the dramatic changes that have taken place between the societies served by customary law in ancient times and that of the modern age. It appears from the recent Constitutional Court's ground-breaking decision in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA46 (CC) 110 that the courts are not sensitive to the need to prioritize the black woman's rights to access land and housing on equal terms with males. Although counsel and the court were prepared and did in fact consider a broad spectrum of issues that deal with the capacity to access resources necessary for a basic living that is consistent with human dignity, no reference was made to the issue of gender. Neither the court nor the lawyer referred to state practice regarding the provision of land and housing for women in line with the equality provision in Section 9 (3) of the Constitution. This silence was remarkable because the applicant was a landless woman who led other landless people to invade land.

³³⁰ 2005 (1) BCLR 1 (CC).

³³¹ Bhe's case supra at 38.

³³² Bhe's case supra at 32.

³³³ A labour tenant over the age of 65 cannot be evicted under Section **XX** of the Labour Reform (Labour Tenant) Act.

³³⁴ Under ESTA an occupier of land cannot be evicted from land or a home without an express court order. An unauthorized eviction is an offence under Section 23 (1) of the Act. ESTA has made the eviction of women members of a household extremely difficult because of the conditions that must be fulfilled before such an eviction. See Du Plessis *et al.* (1998: 157).

³³⁵ A similar provision under the Panamanian agrarian reform programme limiting the granting of land to women who were family heads was described as discriminatory. See Modzer (2001 199).

³³⁶ Contrast this with the view that the protection offered by the PIE did not apply to a female who occupied land on the basis of a precarium which had been terminated. See also the Constitutional Court's decision in *Ellis v Viljoen* 2001 (4) SA 795 (C).

³³⁷ 2003 (11) BCLR 1236(C). It is the first time that a direct link has been established between a black woman and legislation dealing with the possession of land.

³³⁸ Supra.

³³⁹ Lahiff attributes the slow pace of land redistribution to the preservation of a land structure driven by market forces.

³⁴⁰ This is a loose group that claims to represent those dispossessed during apartheid and farm workers who have been evicted since the introduction of democratic governance.

³⁴¹ Database of the Land Restitution Commission.

³⁴² The former was re-enacted in Section 2 (1) (d) of the Restitution of Land Right Act 63 of 1997.

³⁴³ Paragraph 40 *Alexkor Ltd and Ano v the Richterveld Community and Ano* Supra.

³⁴⁴ See Paragraph 24.

³⁴⁵ See Paragraph 24.

³⁴⁶ See Paragraph 31.

³⁴⁷ See Paragraph 32.

³⁴⁸ See Paragraph 30.

³⁴⁹ This means that it was indirectly drawing attention to pre-1913 dispossession. See also the Court's statement in Paragraph 32 that 'for the same reason, this court has jurisdiction in relation to all intervening events in relations to which it could be suggested that the community had lost a right on land'. Clearly the question of the restoration of such land would in the normal course of events precede the finding that it had been lost.

³⁵⁰ See Paragraph 30.

³⁵¹ Bennet & Powell and J Van Wyk support it while Roux opposes it.

³⁵² Bennet & Powell set out the factors that need to be established to support a claim of aboriginal title. These include the fact that (a) the claimant's ancestors were in possession – to the exclusion of others – at the time of colonization; (b) the land inherited on the group who inhabited the land was common property passing from generation to generation; and (c) there are traditional laws and customs in existence regulating the group. See also J Van Wyk (2004: 183) who addresses the factors identified in the *Alexkor* case.

³⁵³ Allowing restitution on the basis of aboriginal title will increase the restitution of lost land. Amending the cut-off date would generally increase the number of restitution claims and would, for instance, allow claims to be made in respect of lands specifically identified as dispossessed by Klug (pp. 132-33 of this thesis). Fear of the possibility of claims overwhelming the courts and thereby slowing down the tempo of restitution can be dealt with by extending the jurisdiction to deal with aboriginal claims to the regular courts, as suggested by the LCC in the *Alexkor* case. See also J Van Wyk (2004: 485-86).

³⁵⁴ Justice Waldron has questioned the moral justification of restitution based on aboriginal land title. He argues that the injustices of the past acquisition of land may be superseded by later changed circumstances. Although writing about the United States, Barry (2003: 379) indicates that this kind of thinking could be applied to South Africa. If so, it would strengthen the position of those who benefited from the skewed land policy during apartheid.

³⁵⁵ See s 35(1) of the Constitution Act 1982 of Canada.

³⁵⁶ The authors Lahiff and Chigara, B have made a connection between the two regardless of the distinctions in the property clauses of the two states.

³⁵⁷ S16A (1) of the Constitution (Amendment No.16) Act No. 5 of 2000. This amendment was purely due to the political desire to win the 2000 presidential election in Zimbabwe and reflects the regime's recognition that disaffection with land reform was widespread and could be tapped to achieve political goals in spite of the poor performance of the government.

³⁵⁸ Land invasions are becoming a problem in South Africa. The National Landless People's Movement identified 2003 as the year of land occupations. See De Villiers (2003: 71). The movement's branch in the Eastern Cape stated that it would start land invasions on 14 April 2004, the date of the national elections.

³⁵⁹ The Namibian land reform programme does not include the restoration of ancestral lands. However this has been criticized as reflecting political bias by SWAPO. It has been suggested that SWAPO was not interested in the restoration of ancestral land because ancestral lands were not dispossessed in Ovamboland which constitutes its main base. Namibia presumably has the lowest land restoration scheme in Southern Africa, probably because of its land reform approach (De Villiers 2003: 35).

³⁶⁰ Alexkor Ltd case Supra at Paragraph 60.

³⁶¹ The Alexkor decision in this regard is in accordance with those of Klug (1996: 153-54) who argued that it was possible to identify dispossession dating back to colonial times. Klug made reference to three specific examples in which lands had been dispossessed through a conscious process of corruption and fraud before 1913 that ought to form the basis for restitutionary claims. The author criticized the land restitution scheme as limiting the capacity to deliver access to land to the dispossessed.

³⁶² See Paragraph 61 of the decision.

³⁶³ This formulation deliberately excludes a cut-off date. It makes restitution subject to certain suggested factors. It has the advantage of treating every case according to its merits and is capable of dealing with both bogus and competing claims.

³⁶⁴ Financial compensation for the total area of 445,248 hectares of land restored to date has cost the state a whopping R1.2 billion, excluding restitutionary, discretionary and settlement grants (De Villiers 2003: 65).

³⁶⁵ See Ex Parte Farmerfield Community Property Trust LCC 20/ 1996 and Ex Parte S.Duksh and R T Dulabh LCC 14/1996.

³⁶⁶ The Bill amends Section 35 (5) of the Restitution of Land Rights Act 22 of 1994 and was signed into law in December 2003. See *The Herald*, 24 December 2003.

³⁶⁷ Supra.

³⁶⁸ 2001 (3) SA 1293 (LCC).

³⁶⁹ Supra.

³⁷⁰ 2002 (4) SA 36 (SCA).

³⁷¹ *Mkangeli v Joubert* (Supra), Paragraph 27.

³⁷² See also *Ex Parte Dusksh v Dusksh & R.T supra* and contrast this with the First Certification case already alluded to.

³⁷³ Van der Walt argues that the scales are loaded heavily in favour of the property class and there is no foreseeable chance of effecting a balance between the property class and the dispossessed.

³⁷⁴ Constitution of the Republic of South Africa Act 108 of 1996.

“This book reviews diverse issues related to the phenomena of dispossession such as the notion of land invasions, which have been a subject of protracted litigation in post-apartheid South Africa, women’s access to land and the Bhe Case. This well-written book covers case law up to 2005 and should be commended for being so thoroughly researched.”

- **Professor R B Mqoke, Faculty of Law, Rhodes University, South Africa**

Dispossession and Access to Land in South Africa deals with the conceptualization of access to land by the dispossessed in South Africa as a human right. Yanou examines the country’s property model in the context of the post apartheid constitutional mandate to redress the skewed land distribution of the past. The book reviews the strengths and weaknesses of the land restitution process as well as the question of the payment of just and equitable compensation for land expropriated for restitution. It also reviews the phenomenon of land invasion and quality of access to land enjoyed by the South African black woman under the present dispensation.

Yanou argues that the courts have, on occasions, construed just and equitable compensation generously. This approach has failed to reflect the fact that what is being paid for is land dispossessed from the forebears of indigenous inhabitants. In a South Africa that lost most of its ancestral land during colonialism and apartheid, access to land for the dispossessed should not be equated with the protection of property acquired under apartheid. Getting it right would entail truth and reconciliation with the collective dispossession suffered by South African blacks.

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